TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 298

JOHN B. FRISBIE, APPELLANT,

vs.

LEVI H. WHITNEY.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

[illegible] 9, 1868.

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Record from Supreme Court of the District of Columbia. Levi Whitney vs. John B. Frisbie. 734; Equity docket 8.

1 In the Supreme Court of the District of Columbia.

Clerk's certificate.

LEVI H. WHITNEY
vs.
JOHN B. FRISBIE. } 734; Equity docket 8.

I, Return J. Meigs, clerk of the Supreme Court of the District of Columbia, certify that originals, of which the following writings are true and complete copies, are on file and of record in the clerk's office of said court; and that said originals together constitute the record of the proceedings of said court in a certain cause therein depending and lately decided, entitled as above.

In testimony whereof I have subscribed my name and affixed the seal of said court this 19th day of October, 1868.

[SEAL.] R. J. MEIGS, *Clerk.*

2 *Bill of complaint.—Filed July* 21, '66.

To the judges of the Supreme Court of the District of Columbia:

Levi H. Whitney, a citizen of the State of California, brings this his bill against John B. Frisbie, also a citizen of the State of California, both of said parties being now in the city of Washington, within the jurisdiction of this court.

And thereupon your orator complains and says, that on or about the 28th day of October, 1862, he, your orator, entered upon and occupied the southwest quarter of section No. 30 in township No. 4 north of range No. 3, west of Mount Diablo meridian, in the county of Napa, California; that at the time of said settlement the said land was a part of the public domain of the United States, and subject to the right of pre-emption under the laws thereof; that your orator, being a citizen of the United States, the head of a family, and otherwise fully qualified therefor, settled on said quarter section
3 of land with a view to enter the same under the general pre-emption laws; that he erected a dwelling-house thereon, and occupied the same with his family, and that he has continued to occupy the same and to cultivate the said land down to the present time.

Your avers that he has fully and faithfully performed all the conditions required by the pre-emption laws of the United States, and that he is now rightfully entitled to enter the said land and to obtain a patent therefor on payment of the price fixed by law.

Your orator further states that the said land is part of the tract formerly known as the Soscol ranch, which was claimed under a pretended Mexican grant by one M. G. Vallejo. Under the act
4 of Congress approved March 3d, 1851, entitled "An act to

ascertain and settle the private land claims in California," the aforesaid grant was investigated by the commission established for for that purpose and in the courts of the United States, and the final decision, declaring the said pretended grant to be utterly void, was made by the Supreme Court of the U. S. on the 24th of March, 1862. By virtue of that decision the whol of said ranch, by the terms of said act of March 3d, 1851, became a part of the public domain, and by virtue of other acts of Congress were made subject to settlement and pre-emption.

Your orator further states that the defendant, Jno. B. Frisbie, is the son-in-law of the said M. G. Vallejo, and some time in the year 1855 received a conveyance from his said father-in-law for a large part of the land within the limits of the said pretended grant, including the land settled upon by your orator and claimed by pre-emption as above stated. And on the 3d March, 1863, at the solicitation of said defendant and other purchasers from said M. G. Vallejo, Congress passed the act of that date entitled "An act to grant the right of pre-emption to certain purchasers on the Soscol ranch, in California." Under the provisions of this act the Commissioner of the General Land Office issued instructions to the register and receiver of the land office at San Francisco, directing an investigation and a report of the facts as to the settlements of the various claimants of the said lands, whether as pre-emption claimants under the general laws, or as claiming title under the said pretended grant to the said M. G. Vallego. The said register and receiver took the testimony and returned the same to the General Land Office, with their opinion rejecting the claims of all the settlers under the general laws, upon the ground that the said lands, after the aforesaid decision of the Supreme Court of the U. S., were not open to pre-emption; your orator's claim, among others, was thus rejected. But the Commissioner of the General Land Office took a different view of the law, and in certain cases adjudicated by him declared that the said lands were subject to pre-emption under the general laws, and sustained the rights of the pre-emption settlers. An appeal was taken in one case to the Secretary of the Interior, who reversed the decision of the Commissioner, and declared that the act of 3d March, 1863, above cited, has the effect to deprive the pre-emption settlers of all rights under the general laws of the land. In pursuance of this decision an order has been issued to the local land office authorizing the said Jno. B. Frisbie, and other purchasers of the Vallejo title, to enter the lands claimed by them, and the said defendant, Jno. B. Frisbie, is now about to enter and receive a patent for the quarter section of land above described and justly claimed by your orator as his home under the laws of the United States.

Your orator expressly charges that the said Jno. B. Frisbie has never resided on the quarter section aforesaid, although by his tenants he did pretend to hold and cultivate the same as part and parcel of a large tract of at least twelve or fifteen hundred acres. Your orator forbears to make any question as to the right of said Frisbie to enter lands under said act of March 3d, 1863, which

were not occupied by him in person, especially as he was claiming other large tracts at the same time held in possession in the same way, only by his tenants; but your orator insists that after the decision of the Supreme Court of the U. S. in March, 1862, and before the passage of the special act of March 3d, 1863, above mentioned, the said lands were by law open to pre-emption; and your orator having within that period made a bona fide settlement, and having fully compied with all the conditions prescribed by law, is vested with the right to enter said lands.

Your orator further states that his proofs, as returned by the said register and receiver, are full and complete, showing him to be entitled to the said land land under the pre-emption laws, and the only obstacle presented to prevent his entry is the construction placed on the said act of 3 March, 1863, by the Secretary of the Interior. The said construction is manifestly erroneous, the same being contrary to numerous decisions of the Supreme Court of the U. S. and to
8 the uniform practice of the General Land Office and the Department of the Interior in all similar cases.

Your orator further states that immediately upon the entry of said land by the defendent, Jno. B. Frisbie, even before the issuing of the patent, the said defendant will be able to eject your orator from the premises aforesaid; he will also, on receiving the patent which is now finally awarded to him, be at liberty to sell said land to an innocent purchaser, and thus wholly to defeat the just claim and right of your orator, who will thus be deprived of the home which he has settled and improved under the guarantee of the laws of the land.

In consideration of the premises, and because your orator has no remedy at law, he prays that the said defendant, Jno. B. Frisbie, may be required to make answer to the several allegations of this bill; that he may be enjoined and restrained from entering the said land and receiving the patent for the same, which is now
9 about to be issued to him; that he may be restrained from selling said land and from conveying the same, and from ejecting your orator therefrom; that the said defendant, if he has already entered said lands, may be declared to hold the same in trust for your orator, and may be compelled to convey the same accordingly upon payment of the purchase-money required by law; and that such other relief may be granted as to your honors may seem meet and suitable to the exigencies of the case. To this end may it please your honors to grant the most gracious writs of subpœna and injunction, commanding, &c.; and your orator, as in duty bound, will ever pray, &c., &c.

WALKER & STANTON,
Solicitors for Compl't.

LEVI H. WHITNEY.

Sworn and subscribed before me this 21st July, 1866.

R. J. MEIGS, *Clerk.*

10 In the Supreme Court of the District of Columbia, July 21st, 1866.

Summons to answer.—Issued July 21, '66.

LEVI H. WHITNEY, complainant,
against
J. B. FRISBIE, defendant.
} Equity, 734; docket 8.

The President of the United States to John B. Frisbie, defendant:

You are hereby commanded to appear in this court at its first special term, occurring twenty days after service of this subpœna, and answer the exigency of the bill, under pain of attachment, and such other process of contempt as the court shall award.

Witness D. K. Cartter, chief justice.

[SEAL.] R. J. MEIGS, *Clerk.*

MEMORANDUM.—That the defendant is to enter his appearance in this suit, in the clerk's office, on or before the special term to which this writ is returnable; otherwise the bill may be taken for confessed.

Marshal's return.

Sum'd the def't.
July 21st, '66.

D. S. GOODING, *Marshal.*

11 *Order for hearing.—Filed July* 21, '66.

Ordered at chambers, this 21st day of July, 1866, that I will hear the prayer for injunction, &c., made in this cause, on Monday, the 30th instant, at the court-room, at 10 o'clock a. m., provided notice of the filing of this bill and of said hearing be given to the defendant on or before the 25th instant.

ANDREW WYLIE.

Marshal's return.

Served copy of the within order on def't.
July 21st, 1866.

D. S. GOODING, *Marshal.*

Appearance for def't, July 27, '66.

WHITNEY
vs.
FRISBIE.
} 734, equity.

On motion of J. H. Bradley, jr., the appearance of Messrs. Bradley & Bradley, M. Blair and F. A. Dick, is this 27th of July, 1866, entered for the def't.

By the clerk.

12 In the Supreme Court, Dist. of Col'a.

Deft's answer.—Filed July 27, '66.

JOHN B. FRISBIE *ats.* LEVI H. WHITNEY. } No. 734, in equity.

The answer of John B. Frisbie to the bill of complaint of Levi H. Whitney:

This defendant, now and at all time saving and reserving to himself all and all manner of benefit of exception and advantage to the errors and insufficiencies of the said bill, answering, says:

He does not remember, if he ever knew, the day on which the complainant entered, but he admits that he did in the month of October, 1862, enter upon the southwest quarter of section No. 30, in township No. 4 north of range No. 3, west of Mount Diablo meridian, in the county of Napa, California. How far that entry
13 was accompanied or followed by any acts of occupation, so as to make it a settlement, as claimed in said bill, and whether the land so entered upon was subject to the right of pre-emption under the laws of the United States, are facts and conclusions of law which, as appears by the said bill, have been decided against the complainant by authorities under the laws of the United States; and this defendant denies that the said land was open to settlement for pre-emption, or that the complainant so settled as to give him any inchoate right therein.

It is true the complainant did erect on said piece of ground a small frail tenement, and did go there to reside, and his wife has continued to occupy the same ever since; but as to the cultivation of the said land by the complainant, this defendant does not admit the same to be true, unless it be that immediately around and adjacent to the said temporary dwelling there may be a small patch
14 worked, so as to give color to the complainant's pretence of a pre-emption right thereto. And this defendant denies that complainant has fully and faithfully performed all the conditions required by the pre-emption laws of the United States, or that he is now or ever was rightfully entitled to enter the said land and to obtain a patent therefor on payment of the price fixed by law.

It is true that the said land is part of the tract formerly known as the "Soscol ranch." It is also true that in 1862 the Supreme Court of the United States decided that the grant under which said land was claimed to have been granted to M. G. Vallejo was void. What the effect of that decision was upon the rights of the purchasers under that grant, who had by themselves and their tenants settled and improved the land, is a question of law; but this defendant will maintain that it did not subject the said land to settlement and pre-emption by strangers.

15 It is true that in the year 1855 this defendant secured a conveyance of part of the said land from Vallejo, the grantee,

and afterwards purchased other portions; and he avers that he paid large sums of money therefor; that his said purchase (and the conveyance aforesaid from Vallejo was one of them) were made at fair market prices, and he paid a full consideration; that they were made bona fide, and in full confidence in the validity and integrity of the said grant, and under his said purchases he went into the actual cultivation and possession of the said land (including that now claimed by complainant) years before, and was in the actual possession, cultivation and enjoyment of the same, and had erected thereupon buildings and other improvements to the value of several thousand dollars, when the complainant intruded thereon, as stated in his said bill, in October, 1862. It was at or about the same time invaded and seized upon by many others. Upon the facts being laid before Con-
16 gress, that body was so well satisfied of the fairness and justice of the claim of this defendant that on the 3d March, 1863, they passed the act of that date referred to in said bill. This defendant and those interested with him without delay proceeded at their own expense to have the land surveyed and the plats returned, and did all other acts required of them by the said law, and other laws, to have the said land surveyed to correspond with the other surveys; this defendant during the whole time retaining possession of this part of said land, except where it was forcibly detained from him by arms and combinations, to put down which would have led to a civil war. Upon the return of the surveys and plots as aforesaid, a struggle was begun by the complainant to perfect his title to the quarter section named in said bill, and it is true, as stated in said bill, that the Commissioner of the General Land Office instructed the register and receiver at San Francisco to take
7 testimony and report the facts as to the opposing claims. It is also true, as stated, that the register and receiver took the testimony in complainant's case, decided the case against him, and reported all the evidence, with their decision, to the Commissioner of the General Land Office. No decision has been made in the General Land Office upon the claim of the complainant. It is true some of the cases reported by the register and receiver were acted upon, and their decision was reversed by the Commissioner. And it is substantially true, as stated in said bill, that this decision of the Commissioner was reversed by the Secretary of the Interior, and the decision of the register and receiver confirmed. But it ought to have been stated, and the fact is so, that the decision of the Secretary is very brief and is founded on the opinion of the Attorney General, to whom the questions were referred by the said Secretary; and this defendant files, as an exhibit with this answer, a true copy of said opinion, marked E. A.

18 So far as this defendant is informed and believes, no "order has been issued to the local land office authorities authorizing the said John B. Frisbie and other purchasers of the Vallejo title to enter the lands claimed by them," as is stated in said bill. Nor is it true, as stated in said bill, that this defendant is about to receive a patent for the quarter section claimed by complainant.

Nor does he deem such patent necessary for any purpose of his own. He has brought an action of ejectment in the District Court of the 3d judicial district of the State of California, in which State the land in controversy lies, against the said Levi H. Whitney, to recover possession of said land, which action is now pending, and he will be entitled to judgment therein upon proof of his prior possession, unless the said Whitney can show title paramount to the said land named in said bill. The courts of the United States also are open to said Whitney, if the title shall be decided against
19 him. The Courts of Equity are open to him in that State, if he has any equitable title, and he has as complete remedy there as he can have here.

No decision has been made by the Commissioner of the Land Office overruling the decision of the register and receiver as to this quarter section, and he is advised that their decision is final and conclusive until the same is reversed.

He is further advised that there is no charge or pretence of any fraud practiced by him in the procuring of that decision, and there are no equities as between complainant and this defendant which can give this court jurisdiction to control the action of the land office or prevent this defendant from prosecuting his said claim according to the due course of law; and he prays to have the same benefit of this answer as if he had pleaded specially to the jurisdiction of this court, and that he may be dismissed with his costs.

JOHN B. FRISBIE.

20 STATE OF NEW YORK,
City and County of New York, ss:

John B. Frisbie, the defendant named in the above-entitled cause, being duly sworn, doth depose and say, that he has read the foregoing answer to the complainant, filed in this cause, and that the same is true of his own knowledge, except as to the matters stated upon information, and as to those matters he believes them to be true.

JOHN B. FRISBIE.

Subscribed and sworn to before me this 25th day of July, 1866.
[SEAL.] JAMES C. AUSTIN,
Notary Public.

Amendment to bill.—Filed July 30, '66.

To the judges of the Supreme Court of the District of Columbia, in chancery:

The amended bill of complaint of Levi H. Whitney against John B. Frisbee.

21 In addition to the facts stated in the original bill, your orator now states that since the filing of his original bill he has received official information from the Secretary of the Interior as to the exact condition of the controversy between the complain-

ant and defendant in that department of the government, as will appear by the copy of the letter of the said Secretary to the Commissioner of the General Land Office, dated July 18th, 1866, and hereto appended, marked "Exhibit A," and prayed to be taken as a part of this amended bill. By this proceeding your orator is denied an investigation of his proofs taken to establish his right to a pre-emption on the land described in his original bill, and the Hon. Secretary of the Interior adopts the opinion of the Attorney General as referred to by him, which unequivocally awards the said land to the defendant, inasmuch as your orator does not deny, and cannot deny, that the said defendant, Frisbie, was in possession of
22 said land in the manner and to the extent required by the said opinion of the Atto. Gen'l, in order to bring him, the said defendant, within the provisions of the special act of March 3d, 1866. But your orator expressly denies that the said opinion of the Attorney General and the decision of the Secretary of the Interior founded thereon are in conformity with the law and the just rights of your orator in the premises.

Your orator further states that prior to the passage of the said special act of March 3d, 1863, to wit, on the 13th day of Jan'y, 1863, the surveys of the township, including the land aforesaid, were completed, and the surveyor general of California was ready to return the plats thereof into the land office at San Francisco. Upon the return of said plat your orator would have been entitled by law to enter his said land under the pre-emption laws of the United States. And your orator avers that he was then and there
23 ready, waiting and anxious to make his proofs, pay the legal price, and enter the said land; but, to his great surprize, the said surveyor general on that day received a telegraphic order from the Commissioner of the General Land Office commanding him to suspend his action on the Soscol lands, or in other words to withhold the plats, so as to prevent the pre-emption claimants from entering the said lands. Your orator files herewith a copy of the record of these facts, and also of his proofs of settlement, marked "Exhibit B," and prayed to be taken as part of this amendment.

Your orator expressly charges that this order was issued at the suggestion and by the solicitation of the said defendant Frisbie, on the pretext that he had made application for relief to Congress, and the said special act of March 3d, 1863 was then pending as a bill before the national legislature. And in pursuance these unjust and oppressive proceedings, the Commissioner of the General Land
24 Office, on the 29th January, 1863, both letter and by a telegram, instructed the register and receiver at the land office in San Francisco that no declaratory statements could be filed by the pre-emption claimants until after the return of the plates of survey.

Thus, by the fraudulent and unjust management of the defendant, your orator was prevented from proving his pre-emption until after the passage of the special act aforesaid; and now the Secretary of the Interior, under the advice of the Attorney General, decides that

the said special act wholly deprives your orator of any right in the premises whatever.

Your orator further states that the said defendant, Jno. B. Frisbie, has heretofore greatly molested and disturbed him in the possession of the land aforesaid, taking his crops and forcing him into litigation in the courts of California; and the purpose of the said defendant now is to drive him from the premises, and to deprive him of the benefit of his labor and money expended thereon. Your orator alleges that these proceedings are fraudulent, unjust and oppressive, and he therefore prays, as in his original bill, that the said defendant may be restrained and enjoined from disturbing, or in any way molesting your orator in his possession of the said premises until the final hearing of this cause.

LEVI H. WHITNEY.
WALKER & STANTON,
Solicitor for Complainant.

Subscribed and sworn before me July 30, 1866.
R. J. MEIGS, *Clerk.*

Order for leave to file amended bill, July 30, '66.

Leave given this 30th July, 1866 to complainant to file this amended bill, on furnishing a copy to defendant's counsel.
ANDREW WYLIE.

Marshal's return.

Served copy of the within amended bill on Bradley & Bradley, this 16th of August, 1866.
D. S. GOODING, *Marshal.*

[Copy.]

Exhibit "A."—Filed July 30, '66.

DEPARTMENT OF THE INTERIOR,
Washington, D. C., July 18th, 1866.

SIR: This department received in due time your letter of the 16th ultimo, transmitting a letter from Fred. P. Stanton, esq., relative to the Soscol ranch case, &c. You request special instructions from the department upon the matter therein contained.

The department deemed it proper that no further action should be taken in said case, as it was officially informed that the Committee on Public Lands in the House of Representatives would submit for the consideration of Congress some measure for the relief of the settlers within said ranch who claimed under the general pre-emption laws.

The request made by Mr. Stanton that action on the subject

should be suspended until Congress should act on the petition of such settlers was cheerfully complied with. Since the date of your letter each branch of Congress has acted upon the subject, and by a direct vote refused to interfere and extend such relief, and it now becomes the duty of the department and of your office to carry into effect the law applicable to the cases, as it has been construed by the opinion of Mr. Attorney General Speed, a copy of which was transmitted to you on the 5th ultimo for your guidance and information.

In regard to Mr. Stanton's request, that you take up and investigate each individual case of a claimant, under the general pre-emption laws, to a parcel of land within such ranch, I have to remark that such claimant is, by the terms of that opinion, precluded by the act of March 3d, 1863, from making an entry and obtaining a patent for such parcel, if it forms part of a tract which, at the time of the adjudication therein referred to, was in possession of a bona fide purchaser from Vallejo or his assigns, who within the period and in the manner prescribed by that act, made claim to such tract, accompanied by the proof required to bring bring the case within its provisions.

The Attorney General further remarks: "On the passage of the act of 1863, the right of such persons to make proof and payment, and of necessity therefor to make entries of the land claimed by them, was placed in obeyance, and by the operation of that statute remained in obeyance until it was ascertained, in the manner designated by the act, that the lands claimed had not been, at the date of the adjudication of the Supreme Court, reduced into possession by a bona fide purchase from Vallejo or his assigns, either through the neglect of any such purchaser to present his claim to the register and receiver within the time limited by the statute, or through the failure of any such purchaser to establish his title to the tract comprehending the lands claimed under pre-emption laws. The material and controlling question for determination is whether the lands embraced within said ranch have been so claimed by such purchaser or purchasers with the requisite proof of possession and title. If that question be found by you in the affimative, it disposes of the matters in controversy, and no other question either of law or facts remains for consideration.

As the alleged adverse pre-emption right constitutes no bar to the allowance of the claim of a Vallejo purchaser, who has under the special act made out a case for relief in regard to a tract embraced in such ranch, it follows that it was not your province to decide whether a party asserting such a right to a parcel of land included in such tract has made proof of personal settlement, and the other facts which would, under ordinary circumstances, and in the absence of the paramount claim of such a purchaser, empower him to "prove up" and acquire title. I see no objection, however, to allowing the pre-emption claimants to contest the rights of the alleged purchasers from Vallejo, so far as to require them to make out a claim under the act of March 3d, 1863, and you may

instruct the attorneys of said claimants to that effect, giving the 30 days from the date of your decision within which to prosecu an appeal therefrom to this department. The points of exception must, however, be confined to the sufficiency of the proof offered by the Vallejo purchasers, to bring their respective claims within the provisions of said special act.

Your instructions should therefore be modified, so as to conform to these views.

I am, sir, very respectfully, your ob't servant,

JAS. HARLAN, *Secretary.*

To the Commissioner of the General Land Office.

31 *Exhibit B.—Filed July* 3, '66.

GENERAL LAND OFFICE, *July* 25, 1866.

I, J. M. Edmunds, Commissioner of the General Land Office, do hereby certify that the annexed are true and literal exemplifications from the records and files of this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.]

J. M. EDMUNDS,
Commissioner of the General Land Office.

GENERAL LAND OFFICE, *January* 13, 1863.

Surveyor General Beale, San Francisco, California:

Stay proceedings; do not act in regard to "Soscol." Answer.

J. M. EDMUNDS,
Commissioner.

75. Dated San Francisco, 13 Jan'y, 1863.

Rec'd, Washington, Jan'y 13, 1863, — o'clock, —, min., — m.

To Commissioner Gen'l Land Office:

Proceedings in survey of Soscol suspended.

E. F. BEALE,
Survey. Gen'l.

32 [Telegram.]

Register and Receiver, Land Office at San Francisco, California:

Soscol declarations can only be filed after subdivisional work in field and return of plat. Sec. [sec.] 7, act 30 May, 1862. No need for apprehension of claimant. Full instructions by mail.

Washington, D. C., Jan'y 29, 1863.

J. M. EDMUNDS,
Commissioner of the General Land Office.

GENERAL LAND OFFICE, *January* 29, 1863.

Register and Receiver, San Francisco, Cal'a :

GENTLEMEN : Referring to my telegraphic message of this date, I have to add that the Soscol claim (rejected by the Supreme Court U. S., 1st Black's report, p. 541) has not yet been subdivided by the surveyor general as public lands.

How then can declaratory statements be filed when parties
33 cannot, as in this case, give the description of the tract claimed according to the lines of the public surveys? It must be obvious, in the absence of subdivisional work, this cannot be done.

Where inceptive rights attach under the pre-emption law to lands in the predicament of those embraced by the "Soscol," the parties holding bona fide interests can suffer no injury or prejudice. They only stand in obeyance until such surveys are made as will enable them properly to designate their claims in declaratory statements, and thereafter consumate them according to law. At this point I may add that a bill is before Congress, commended by this office and the California delegation to favorable consideration, for the protection of the equitable claims of parties within the limits of Soscol.

Very respectfully, your obedient servant,

J. M. EDMUNDS,
Commissioner.

34 In respect to the claim of Levi H. Whitney to the SW. $\frac{1}{4}$ of section No. 30, in township No. 4 north of range No. 3 west, Mount Diablo meridian, being part of the land in dispute in this case, the register and receiver, from said evidence, do find the following facts :

That at the time of the alleged settlement on said land said pre-emption claimant was a citizen of the United States and the head of a family.

That at the time of said alleged settlement said land was fenced in, improved, in the actual possession of, and under cultivation by, John B. Frisbie, Vallejo claimants in this case.

35 That said pre-emption claimant has resided upon said land, and put on valuable and permanent improvements and there resided with his family.

Wherefore his claim thereto is hereby rejected and disallowed, upon the ground that the land was not open for settlement and has been withdrawn by the special act of March 3rd, 1863.

I, Levi H. Whitney, of Napa county, in the State of California, do solemnly swear that I will support, protect and defend the Constitution and government of the United States against all enemies, whether domestic or foreign, and that I will bear true faith, allegiance and loyalty to the same, any ordinance, resolution, or law of any State, convention, or legislature to the contrary notwithstanding;

and further, that I do this with a full determination, pledge and purpose, without any mental reservation or evasion whatsoever. And further that I will well and faithfully perform all the duties which may be required of me by law. So help me God.

[SEAL.] LEVI H. WHITNEY.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

Sworn and subscribed to before me this seventh day October, 1864.

JAMES W. SHANKLIN,
Receiver of the Land Office at San Francisco, Cal'a.

Pre-emption affidavit.—California.

I, Levi H. Whitney, claiming the right of pre-emption under the provisions of the act of Congress entitled "An act to provide for the survey of the public lands in California, the granting of pre-emption rights therein, and for other purposes," approved March 3rd, 1853, to the SW. ¼ quarter of section number 30 of township number four north of range number three west, subject to sale at San Francisco, Cal., do solemnly swear that I am not the owner of three hundred and twenty acres of land in any State or Territory of the United States, nor have I settled upon and improved said lands to sell the same on speculation, but in good faith to appropriate it to my own exclusive use or benefit. And that I have not directly or indirectly made any agreement or contract, in any way or manner, with any person or persons whatsoever, by which the title which I may acquire from the government of the United States should enure, in whole or in part, to the benefit of any person or persons except myself.

LEVI H. WHITNEY.

I, James W. Shanklin, receiver of the land office at San Francisco, do hereby certify that the above affidavit was taken and subscribed before me this seventh day of October, A. D. 186–.

JAMES W. SHANKLIN,
Receiver.

Here Mr. Brittan offers to prove up the right of Levi H. Whitney as a pre-emptor to enter the SW. ¼ of section No. 30, T. 4, N. & R. 3 W.

Date of settlement Oct. 28th, 1862.
" " filing " 21, 1862.

Here Wells, as counsel for the Vallejo claimants, objects as follows:

That the settlement was unauthorized by law, and that prior to the filing the land had been withdrawn from the operation of the

general pre-emption laws by the special act of Congress of March 3rd, 1863.

Percival Shaffer, being called as a witness and first duly sworn, says :

I am 33 years old; reside in Solano co., Cal., and am a farmer.

Ques. Do you know Levi H. Whitney, and how long have you known him?

Ans. I have known him since about the 27 or 28th of October, 1862.

39 Ques. Is he a citizen of the U. S.?

Ans. I believe him to be a citizen of the United States.

Ques. State whether he is married or single.

Ans. He is a married man, having a wife and three children living with him.

Ques. Do you know the tract he claims as a pre-emptor? and, if so, describe it.

Ans. I do. It is the SW. $\frac{1}{4}$ of sec. 30, T. 4 N., and R. 3 W.

Ques. State when he settled upon that tract, and what he has done upon it.

Ans. He settled on or about the 28th day of October, 1862. He has built a house with three rooms ; two of the rooms 12 by 14 or 16 each. The third room is about 12 feet square ; has 3 windows, doors, roof and floor ; has a cellar about 5 or 6 feet deep, and a passage on one side. The house is completely furnished and whitewashed. He built a barn large enough for five horses. and an addition to it that would hold 6 or 8 tons of hay ; has a large

40 corrall, chicken-house and pig-pen. The chicken-house is about 10 by 14, roofed over and all complete. He dug a well on the place. He cultivated about 80 acres ; put it in the winter of 1863–4 to wheat and barley. In the winter of 1862–3 he plowed about 30 acres, but did not sow it. He had a vegetable garden of about 3 acres in 1863 and in 1864.

Ques. Did he ever cut hay on the place ; and, if so, when and where?

Ans. He cut about 30 tons of hay on about 50 acres of land in 1863, on the SW. $\frac{1}{4}$ of sec. 30, the land he has applied for. In the field there was about 100 acres of land. Perhaps there was more land cut over than 50 acres ; the grass was very light.

Ques. State with regard to his stock when he went on there.

Ans. I don't know the exact number ; but he had 12 or 14 head of horses and mules.

Ques. What has he now?

41 Ans. He has 5 head of horses and two cows and calves, and two hogs, and about 100 head of poultry.

Ques. Has he resided continuously on this tract since the date of his settlement?

Ans. He has.

Ques. Did he abandon his own land in the State of California to settle upon this land?

Ans. Not to my knowledge. He crossed the plains the summer of 1862, I believe.

Ques. Do you know whether or not he was sued for this land by the claimants under the Vallejo title.

Ans. He was.

Ques. What was the result of that suit?

Ans. He carried the suit to the Supreme Court and got a decision in his favor.

Ques. What was the suit for?

Ans. It was to get possession of the land. It was an action of unlawful entry and forcible detainer.

PERCIVAL SHAFFER.

42 The foregoing testimony having been read by the witness and corrected to his satisfaction, was by him subscribed and sworn to before me this 7th day of October, 1864.

JAMES W. SHANKLIN, *Receiver.*

William P. Welch, being called as a witness, and first duly sworn, says:

I am 30 years old; reside in Napa co., Cal., and am a farmer and school-teacher.

Ques. Do you know Levi H. Whitney, and, if so, is he a citizen of the United States, and married or single?

Ans. I have known him since the fall of 1862. He is a citizen of the United States and a married man, having a wife and three children living with him.

Ques. Do you know the tract he claims as a pre-emptor? and, if so, describe it.

Ans. I do. It is the SW. ¼ of sec. 30, T. 4 N., R. 3 W.

43 Ques. State when he settled there and what he has done on it.

Ans. He settled there in the fall of 1862. I first saw him there in Nov. of that year. He was settled there at that time. He has built a house, a comfortable one, with three good-sized rooms, with a porch on one side of the house. He has also built a barn and corral for hay that will stable 5 head of [head of] horses, and hold several tons of hay. He has one corral, a hen-house, pig-pen and well on the place. In the fall of 1862-3 he plowed quite a large piece of ground, and in 1863–4 he cultivated, I should judge, about 80 acres, (eighty.) In 1863 he cut what hay there was on about 100 acres of the land. I have noticed something of a garden there for the last two seasons.

Ques. State whether he has resided there continuously since you first saw him there.

Ans. He has.

Ques. State what stock he has and had.

44 Ans. When he went there he had 12 or 14 head of horses and mules. He has now 5 head of horses, 2 cows and some calves, 100 head, or thereabouts, of poultry, and a few hogs and one sheep.

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Ques. What has he now?

41 Ans. He has 5 head of horses and two cows and calves, and two hogs, and about 100 head of poultry.

Ques. Has he resided continuously on this tract since the date of his settlement?

Ans. He has.

Ques. Did he abandon his own land in the State of California to settle upon this land?

Ans. Not to my knowledge. He crossed the plains the summer of 1862, I believe.

Ques. Do you know whether or not he was sued for this land by the claimants under the Vallejo title.

Ans. He was.

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PERCIVAL SHAFFER.

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Ques. State whether he has resided there continuously since you first saw him there.

Ans. He has.

Ques. State what stock he has and had.

44 Ans. When he went there he had 12 or 14 head of horses and mules. He has now 5 head of horses, 2 cows and some calves, 100 head, or thereabouts, of poultry, and a few hogs and one sheep.

Ques. Did he abandon his own land in California to settle on this land.

Ans. He did not. He came that year, 1862, across the plains from Kansas.

W. P. WELCH.

The foregoing testimony having been read by the witness and corrected to his satisfaction, was by him subscribed and sworn to before me this 7th day of October, 1864.

JAMES W. SHANKLIN, *Receiver*.

Order for injunction.—Filed Aug. 16, 1866.

Order for injunction.

The motion of complainant for an injunction, as prayed in this bill, having been argued and duly considered, it is ordered by me, at chambers, this 16 day of August, 1866, that the injunction be granted, to continue in force till final hearing.

ANDREW WYLIE.

45 In the Supreme Court of the District of Columbia.

Injunction.—Issued Aug. 17, '66.

LEVI H. WHITNEY *vs.* JOHN B. FRISBIE. } 7348; Equity docket 8.

The President of the United States to the defendant greeting :

For causes and reasons set forth and shown in the bill filed in this cause, you are hereby enjoined and strictly prohibited from "entering the land mentioned in the bill, and from receiving the patent for the same, and from conveying the same, and from ejecting the complainant therefrom" "until the final hearing of this cause."

Hereof fail not, under pain of attachment and such other process of contempt as may be issued by the court against you.

Witness David K. Cartter, chief justice.

[SEAL.] R. J. MEIGS, *Clerk*

Aug. 17th, 1866.

Marshal's return.

Served copy of the within writ on Joseph H. Bradley, jr., this 17th of Aug., 1866.

D. S. GOODING, *Marshal*.

46 Supreme Court District of Columbia. At Chambers, August 16, 1866.

Opinion of Justice Wylie.—Filed Aug. 24, '66.

LEVI H. WHITNEY
vs.
JOHN B. FRISBIE.

Both parties to this suit are citizens of California, and the land in controversy is in that State also. For these reasons the jurisdiction of this court has been earnestly called in question by the defendant—a question which will be examined presently.

The land consists of a single quarter section, part of a large tract, embracing nearly 100,000 acres, known by the name of the Soscol ranch, and on which are situated the city of Benicia, the town of Vallejo, the United States navy yard on Mare Island, and the depot of the Pacific Steamship Company, besides numerous cultivated farms and a considerable population.

The decision of the questions involved in this controversy,
47 it is said, will affect the interests of many other persons and a large amount of property in that ranch.

The present motion is to obtain an injunction to restrain the defendant from taking out a patent for the quarter section in controversy, and cannot be disposed of, properly, without deciding upon the claims of the respective parties as stated by themselves in the bill, the answer and their respective exhibits.

The Soscol ranch was sold by Micheltorena, then governor of California, to Col. Vallejo, in the year 1844, for the sum of about $5,000, as alleged.

After the Mexican war had closed, and in the year 1851, Congress passed an act under which commissioners were appointed to investigate and decide upon the validity of private land claims in California, and giving the right of appeal first to the District Court, and finally to the Supreme Court of the United States.

Both the board of commissioners and the District Court
48 decided in favor of the validity of Vallejo's title to the whole of the Soscol ranch; but, on appeal to the Supreme Court, that judgment was reversed, and Vallejo's title held to be bad.

In such case the act of 1851 declared the land should "be deemed, held and considered as part of the public domain of the United States." But as these lands had not then been officially surveyed, they were not open to settlement and pre-emption under the laws at that time governing pre-emptions.

The act of 3d March, 1853, which provided a special land system for California, subjected the unsurveyed, as well as the surveyed public lands in that State, to the operations of the act of 4th September, 1841, with certain reservations and exceptions, and on certain terms and conditions therein stated. One of these exceptions

was in these words, "and excepting also the lands claimed under any foreign grant or title."

49 It has been argued that this exception cannot apply to the land in controversy in this case, because the Supreme Court has decided that Vallejo never had any valid grant or title to them from the government of Mexico; that a void grant or title amounts to no title at all, and therefore he claimed under no title whatever; that this ranch, therefore, was not embraced by the exception, and was always open to settlement and pre-emption.

To this it is sufficient to say, in answer, that unless the exception was meant to apply to this case, it could have no application to any other. For, if Vallejo's title had been good, the land would have been private property and not subject to the operation of the act, which applied only to "the public lands in the State of California." But by the 3d proviso of the 6th section of this act, the privilege of settlement and pre-emption on the unsurveyed lands was to continue but for one year from its date. The act of March, 1,

50 1854, extended this privilege till March 1, 1856, when it expired. From this last date, therefore, there existed no right of settlement and pre-emption on any of the unsurveyed lands of the United States, in the State of California, until after the passage of the act of June 2, 1862, ch. 94, which again subjected "all the lands belonging to the United States to which the Indian title has been or shall be extinguished," whether surveyed or unsurveyed, to the operation of the act of 4th September, 1841.

On the 24th day of March, immediately preceding the date of the act of June 2, 1862, the Supreme Court of the United States pronounced its decision declaring void and null the claim of Vallejo to all the lands within the limits of the Soscol ranch. (See United States vs. Vallejo, 1 Black, Rep. 541.)

Both by the special provision which has been referred to in the act of 1851, and by the highest judicial decision, therefore, the lands embraced in the Soscol ranch became a part of the public

51 domain; and by the act of 2d June, 1862, although unsurveyed, was thrown open to actual settlement and pre-emption.

The quarter section of land now in controvesy was entered upon by the complainant in the month of October, 1862; and it appears he has made the necessary improvements and cultivation, and complied, or tendered himself ready to comply, with all the other terms and conditions required by law to entitle him to obtain a patent for the land from the government.

Thus we see that complainant from this date had acquired as good and valid a right to pre-empt this tract of land as can ever be obtained by any settler prior to the completion of his title by patent. But after he had thus acquired an inchoate equitable title to the land, Congress, by passing the act of 3d March, 1863, interposed in behalf of the bona fide purchasers under Vallejo to take it away from him and sell the land to them.

52 This act provided first for a survey to be made of the Soscol ranch, as a portion of the public lands.

Second, that after the plats of survey had been returned to the district land office, "it shall and may be lawful for individuals, bona fide purchasers from said Vallejo or his assigns, to enter, according to the lines of the public surveys, at $1 25 per acre, the land so purchased, to the extent to which the same had been reduced to possession at the time of said adjudication of said Supreme Court."

Section fourth provides that all claims within the purview of the act should be presented to the register and receiver within twelve months after the return of the surveys, accompanied by proof of bona fide purchase under Vallejo, of settlement, and the extent to which the lands claimed had been reduced to possession at the time of the adjudication of the Supreme Court; and said register and receiver were to decide upon said claims under such instructions as should be given them by the Commissioner of the General
53 Land Office, to whom the adjudication were to be returned by the local land office, and no adjudication should be final until confirmed by the Commissioner.

This act constitutes the foundation of the defendant's claim in the present case.

Defendant is the son-in-law of Vallejo, and claims to have purchased from him, in the year 1855, bona fide, a large tract of the Soscol ranch, including the quarter section here in controversy.

The register and receiver, under instructions from the Commissioner of the General Land Office, "took proof" as required, in regard to the claim of the defendant, and decided the case in his favor.

This decision of the register and receiver, however, was reversed by the Commissioner of the Land Office, on the ground that the settlers had obtained a valid right of pre-emption to the land in controversy prior to the passage of the act of March 3, 1863.

The case was then taken on appeal to the Secretary of the Interior, who referred the legal questions involved in the contro-
54 versy to the Attorney General of the United States, who advised the Secretary "that a settler under the pre-emption laws acquires, and can acquire, no vested interest in the land he occupies by virtue simply of settlement; and that no vested interest is obtained until the settler has taken all the legal steps necessary to perfect an entrance in the land office. Before such steps are taken, he has nothing but a contingent, personal privilege to become, without competion, the first purchaser of the property, which he may never exercise or which he may waive or abandon. During the interval between the institution of the settlement and the establishment of the claim by proof and payment of the consideration nominated in the law, Congress has power to dispose of the land at its pleasure. It may recall the privilege previously conferred, or invest any one else with the same privilege, or it may make
55 an absolute grant of the land to other parties, with or without consideration."

Accepting this opinion of the Attorney General as his guide, the Secretary of the Interior has reversed the decision of the Commis-

sioner of the Land Office in this case, made in favor of complainant's right of pre-emption, and as complainant alleges, a patent is about to issue to defendant for the land in dispute, unless the same should be prevented by the injunction of this court, whereby he might be expelled from his possession, or the title be conveyed by defend an to some purchaser without notice, litigation be multiplied, a cloud be cast over his title, and irreparable injury be done him.

It is with much hesitancy that I find myself compelled to dissent from the doctrines of law laid down by so high an authority. But my own convictions are very strong, and I follow them with
56 the less diffidence since the learned Attorney General has failed to support his opinion by reference to any decisions or other authority whatever, or by any arguments deduced from general principles.

In The United States vs. Fitzgerald, 15 Peters, 407, it was decided that no reservation or appropriation of public land can be made after a citizen has acquired the right of pre-emption.

The doctrine is thus broadly laid down in the opinion of the court in that case. But there the defendant had not only made his settlement and entry, but had paid his money to the receiver for it. I do not consider that this last fact effects the principle established by that decision, however, for if Congress may disregard and override the rights acquired by actual settlement, and the expenditure of labor and money in erecting improvements upon the land and
57 subduing it by cultivation, it must possess an equal right to refuse its patent to the pre-emptioner after he has added to these considerations the payment also of the purchase money.

In Lytle vs. The State of Arkansas, 9 Howard, 333, the court say: "The claim of pre-emption is not that shadowy right which by some it is considered to be. Until sanctioned by law it has no existence as a substantive right, but when covered by the law it becomes a legal right, subject to be defeated only by a failure to perform the conditions annexed to it."

In Delassus vs. The United States, 9 Peters, 133, Chief Justice Marshal says that "no principle is better settled in this country than that an inchoate title to lands is property; and again he says: "The inquiry then is whether this concession was legally made by the proper authorities, and might have been perfected [have been perfected] into a complete title." His inference was that the inchoate right which might have been perfected into a complete title was property.

58 In Smith vs. The United States, 10 Peters, 330, Mr. Justice Baldwin, in delivering the opinion of the court, says: "It was never doubted by this court that property of every description, in Louisiana, was protected by the law of nations, the terms of the treaty and the act of Congress; nor that in the term 'property' was comprehended every species of title, inchoate or prefect, embracing those rights which lie in contract, those which are executory, as well as those which are executed." See also Rice vs. Railroad Company, 1 Black, 358.

It seems to me these authorities are conclusive of the question. But the question is equally clear, also, on general principles. It has been for many years the policy of the government to invite immigration, to encourage the growth of the new States, and by
59 this means to increase the population, the wealth and prosperity of the whole country, and add to the greatness, strength and resources of the government itself.

In pursuance of this policy it has passed laws proclaiming the terms upon which persons possessing the requisite qualifications may obtain the right of pre-emption of the public lands, namely: to go themselves, in person, and settle upon and improve the lands they may select, and pay for them afterwards, at the rate of a dollar and a quarter an acre.

If an individual were to offer such terms in any case, he would be bound by his offer, and no court in the land would sustain his defence that he had only offered these terms as a bounty, and could retract them at his pleasure, and sell the land to another.

To be sure the settler has the option, after making his entry and settlement, and up to the time of paying the purchase money and getting out his patent, to remove from the land and abandon
60 his claim, but that option allowed him is part of his contract. The government has granted him the option in the bargain either to go on and fulfil it until his title is perfected by the patent, or to quit the land at his pleasure. In the latter event the government can suffer no damage, for it has parted with no value, and retains the title to the land. It is like a contract for the sale of land in which the owner retains the title as security for the purchase money. The purchaser, unless he have given his personal contract to the contrary, may at any time abandon his improvements and leave the property to its owner without further liability. And yet, had he remained and complied with the terms of his agreement, the owner would have been bound to him for the title, and in the mean time the purchaser had an equitable interest of which no power could deprive him without his own consent, unless taken for public use by the government on payment of its value.

61 The notion that the right of pre-emption of the actual settler is no more than a "bounty" from the government, which the latter may at any time recall, originated probably in this way, and was undoubtedly correct under the early acts of Congress relating to pre-emption.

In the beginning, all persons entering upon the public lands without title or permission from the government were regarded as trespassers, and were so spoken of and threatened with penalties in several acts of Congress. Nevertheless, persons continued to go upon the public lands and make their settlements in defiance of the laws. In 1830, '32, '33, '38 and '40, however, Congress, instead of providing means for driving these trespassers off the lands, enacted several statutes giving those who were thus settled upon the public domain, at the date of the passage of those acts, the privilege of pre-emption for their respective quarter sections, on certain terms therein

specified. This privilege was, in truth, bounty to these trespassers
which they had no right to demand of the government, [for
62 they had no right to demand of the government,] for they had
gone upon the lands not only without inducement, but in defiance of law. Until after the passage of the act of 4th September, 1841, introduced a new system, prospective in operation, and pledging the faith of the government that it would grant to all future settlers upon the public lands, possessing the qualifications prescribed, and who should make improvements and bring their respective tracts into cultivation, the privilege of pre-emption. The former acts are obsolete, and this act now constitutes the general land system on this subject. Under it the settler who enters upon the public land and complies with its terms has the right, by law, to demand his title from the government, by the strict terms of a contract, and not as bounty which the government is at liberty to grant or to withhold at its pleasure.

If these views be correct, the complainant, by making his entry
and settlement on the lands in controversy in this cause, in
63 the month of October, 1862, and erecting his building and cultivating the land, acquired a vested interest therein, which the Constitution has placed beyond the reach of even an act of Congress to take from him and grant to another. I am of the opinion, therefore, that complainant shows a valid equitable inchoate right to the property in question, which he had acquired anterior to the passage of the act of Congress of March 3, 1863, under which defendant denies his claim to have a title granted to him by the government, and that the decision of the Commissioner of the Land Office in favor of the settlers, which was reversed by the Secretary of the Interior, on the advice of the Attorney General, was clearly correct.

But defendant's counsel have, both by the answer in the case and
on argument of the present motion, most earnestly denied the jurisdiction of the Supreme Court of this district over the subject
64 of this controversy, on the ground that it is a suit to decide the
title to land which lies in California, over which, therefore, none but the local court in that State possesses rightful jurisdiction. If such were, indeed, the nature of this controversy, this court would be without jurisdiction to decide it. (See Massie vs. Watts, 6 Cranch, 148.) But if I correctly comprehend the nature of this controversy, the object of the complainant is not to recover the possession of the land in question, for he is already in possession of it, but it is to obtain a decree on the ground of fraud and trust, which will prohibit the defendant from obtaining from the government a patent for the land, which in equity ought to be made to himself; or in case a patent should be granted to the defendant, he may be declared to be a trustee of the legal title for the complainant.

That is a very different question from a question of simple supe-
riority of titles derived from distinct sources, the decision
65 of which belongs to the court having jurisdiction over the land.

Questions involving trust or fraud are personal matters, of which a

court of equity will take jurisdiction wheresoever the defendant may be found and served with process.

In the celebrated case of Penn *vs.* Ld. Baltimore, (1 Ves., Sr. 444,) the Chancellor of England (Ld. Hardwick) decreed a specific performance of a contract respecting lands lying in North America, because, as said by the Ld. Chancellor, "the conscience of the party was bound by the agreement, and being within the jurisdiction of this court, which acts in personam, the court may properly decree it as an agreement, if a foundation for it."

In Massie *vs.* Watts, 6 Cranch, 148, a suit was instituted in the Circuit Court of Kentucky to compel a conveyance of the legal title to land in Ohio, by the defendant, on the ground that he had notice when it was purchased of the prior equity of the complainant;
66 and the defence taken was that the land lay beyond the jurisdiction of the court and within the State of Ohio. This defence was overruled by the court below, and afterwards by the Supreme Court, who held that as the fact set forth in the bill showed that defendant was equitably bound to convey the land, equity would enforce the fulfilment of this obligation, without regard to the place where the land was situated.

"When the defendant is liable," (said Marshal, C. J..) "either in consequence of contract, or as trustee, or as the holder of a legal title, acquired by any species of mala fides practiced on the plaintiff, the principles of equity give a court jurisdiction wherever the person may be found, and the circumstance that a question of title may be involved in the inquiry, and may even constitute the essential point on which the case depends, does not seem to arrest that jurisdiction."

Again he says upon this point, "upon the authority of these cases and of others which are to be found in the books, as well as
67 upon general principles, this court is of opinion that in a case of fraud, of trust, or of contract, the jurisdiction of a court of chancery is sustainable wherever the person be found, although lands not within the jurisdiction of that court may be affected by the decree."

And on this subject it will make no difference whether the defendant be actually domicilled here, or is here only temporarily. In Archer *vs.* Preston, cited by Ld. Nottingham and Ld. Keeper Guilford, in the case of Earl of Arglasse *vs.* Muschop, 1 Vun., 77, 135, a decree was made for the specific performance of a contract respecting lands in Ireland, the defendant having been served with process whilst temporarily within the jurisdiction of the court.

In Baker *vs.* Dumaresque, 2 Alk., R., 66, Ld. Hardwick restrained a defendant from leaving the kingdom for the place of his abode until he should give security to abide the decree.

In Atkinson *vs.* Leonard, 3 Bro., C. C., 218, the writ of ne exeat was granted in favor of an inhabitant of Antigua against another resident of that island who had come to England with his wife for medical advice.

68 In Shattuck *vs.* Cassidy, 3 Edw., Ch. R. 152, and in De Klyn *vs.* Watkins, 3 Sardf., Ch. R., 185, it was held that the juris-

diction of the Court of Chancery in a case of fraud, of trust, or of contract, is sustainable wherever the person sought to be affected is found, although lands not within the jurisdiction of the court may be effected by the decree.

In Guarrant *vs.* Fowler, 1 Hen. & Munf., 4, it was decided that where the decree would affect the lands directly, as in a suit for partition, the court has not jurisdiction if the land be in another State, but a person within the Commonwealth may be decreed to execute a conveyance of lands in another State, or to cancel a deed for such lands obtained by fraud. Even a bill for the foreclosure of the equity of redemption in lands is transitory, and any court where the defendant is found, has jurisdiction. Carfman *vs.* Sayre, 2 B. Mon. Rep., 202.

In Buchanan *vs.* Lorman, 3 Gill, R., 52, the land in ques-
69 tion lay in Virginia, but the defendant was found in Maryland. He had previously obtained a decree in Virginia under which he had purchased the land. The Maryland court decided that it was bound to give full faith and credit to the Virginia decree, but as it would be a fraud on the complainant if defendant were permitted to get the land, the court enjoined him from taking a conveyance under the Virginia decree in his favor.

The only question, then, to be considered is whether, in the language of Chief Justice Marshall, in Massie *vs.* Watts, "the defendant is liable, either in consequence of contract, or as trustee, or as the holder of a legal title acquired by any species of mala fides practiced on the plaintiff;" or, as said by Ld. Hardwick in Penn. *vs.* Baltimore, "the conscience of the party is bound."

Now, it has been shown that the complainant possesses an equitable inchoate title to the land in dispute, in consequence of his entry and actual settlement and improvements made thereon, of all
70 which defendant had notice at the date of the act of 3d March, 1863; and that notwithstanding this defendant has been endeavoring to procure a patent from the government with a view to claim the land as his own, and deprive complainant of the rights acquired by his settlement.

If defendant were to succeed in procuring a patent for this land, under these circumstances, a Court of Equity must hold him to be a trustee of the title for the complainant.

In the United States *vs.* Hughes, 11 Howard, 552, it was held that "when a person entered land according to law, but omitted to obtain a patent for it, and another person afterwards obtained a patent from the United States by proceeding as if it were vacant land, knowing at the same time that it was not vacant, the patent thus obtained will be set aside." And this on the ground that the patentee had been guilty of a fraud upon the government in procuring his patent when he was all the time aware that another person had made
71 an entry of the same land. Here we have decided what will constitute fraud in the eye of equity.

Story says: "Another class of constructive frauds consists of those where a person purchases with full notice of the lagal or equitable

title of other persons to the same property. In such cases he will not be permitted to protect himself against such claims, but his own title will be postponed and made subservient to theirs. It would be a gross injustice to allow him to defeat the just rights of others by his own iniquitous bargains. He becomes by such conduct a particeps criminis of the fraudulent grantor; and the rule of equity as well as of law is dolus et fraus nemini patrocinari debet." 1 Com. on Equity, section 395.

Again, the same author says: "The same principle applies to cases of contract to sell lands or to grant leases thereof. If a subsequent purchaser has notice of the contract he is liable to the same equity, and stands in the same place, and is bound to do that which the
72 person who contracted, and whom he represents, would be bound to do." Ib., sec. 396.

We have seen in the case before us that the government had pledged its faith to grant a title to the complainant for the land in question; that complainant, before the passage of the act of 3d March, 1863, had acquired a valid inchoate equitable interest in the land, of which he could not be deprived, even by an act of Congress, without his own consent, or just compensation, should it be required for public use. We have seen an act of Congress passed for the benefit of this defendant, the effect of which would be to deprive complainant of his property and sell it to the defendant for a dollar and a quarter an acre. The Supreme Court of the United States have frequently declared that in the measures adopted by the government to dispose of the public lands, it is bound by the same obligations of right and law which apply to individuals in like circumstances.

Here, then, is the case of a party who has entered into contract to sell a portion of his lands on certain terms and conditions to
73 be complied with by the purchaser. The purchaser has gone on and fully complied, or offered to comply, with those terms and conditions. Subsequently the owner enters into another contract or engagement to sell the same land to a different person, who has full notice of the previous contract with the other.

In the case of individuals this would amount to constructive fraud, at least, on the part of both, and equity would forbid or annul the transaction. It is not, for a moment, to be imagined that the Congress of the United States could have intended to do injustice to any one by the act of 3d March, 1863. We are to presume that Congress was unaware at the time of its passage of the existence of rights to the Soscol property which had sprung up under the pre-emption laws. That was a private act, and in legal presumption was passed on the application and through the representation of those who were to receive benefit from its enactment. "Every bill for the partic-
74 ular benefit of a person, a company, or a locality in which the whole community is not interested is, in a parliamentary sense, a private bill, brought in on the solicitation of parties." Dwarris on St., 354.

Although the British Parliament will not allow a private bill to be reported, unless on previous notice published in the Gazette, and

petition of the parties interested, and in regard to the Crown lands on certificate of the Crown that the case is a proper one for parliamentary relief, yet I think that even in this country, where these wise preliminaries are not required by Congress, it cannot be regarded as a strained presumption that whenever a private act has been passed by Congress conferring privileges, or affording relief, it was done on the petition and representation of those for whose interests it was passed.

If these be fair presumptions, it follows that the act of 3d March, 1863, was passed in consequence of representations made by parties claiming the Soscol ranch under Vallejo's title, then recently pro-
75 nounced by the Supreme Court to be void; that there were no pre-emption rights in existence as to the land in question with which the act could interfere.

Such representations, whether made in good faith or otherwise, were not true, as we have seen, and for that deception the claimants under Vallejo are responsible.

Now, although this court cannot control the acts of the Secretary of the Interior in this matter, by direct interference, yet, after the subject has been properly brought under its judicial cognizance, it is certainly not bound to adopt the construction given to a law by the Secretary, and if it supposes his decision to be wrong, will, of course, so pronounce its judgment. See Decatur vs. Spalding, 14 Peters, 497.

In this respect, the court proceeds upon the same principles in reference to the acts of the government that it does in regard to the judgment of other courts.

If a proper case for relief in equity be made out, a Court of Chancery will enjoin all proceedings by a plaintiff in his action at
76 law against the complainant in equity; and the injunction will be granted at any stage of these proceedings, either before or after judgment. In doing so, however, the court of law is not made a party to the bill, nor is the injunction issued against the court; but it is issued against the plaintiff in the action forbidding him to take any benefit from his inequitable judgment, or other proceedings. So in the case of the government, or one of the secretaries in his official capacity, this court will not assume to control his acts by direct interference, but it will reach the ends of justice by injunction against the private individual who is attempting to gain an inequitable advantage over his adversary through a decision of the government's officer.

Complainant's equity is therefore shown to be clear; and it is equally clear that this court has jurisdiction to decree relief. The only question that remains to be considered is whether the circumstances of his case are such as require the protecting power of an injunc-
77 tion to shield him from danger during the pendency of his suit, and before a final decree can be obtained.

Although an injunction is something extraneous to a cause, and not a proceeding in it, and ought not to be granted except where it is recommended by the dictates of conscience, and the clearest principles of justice, yet where it is requested upon principles of equity

and justice, it should not be refused. The interference rests on the principle of a clear and certain right to the enjoyment of the subject in question, and a probable injurious interruption of that right, which, on just and equitable grounds, ought to be prevented. See Hilliard on injunctions, section 18.

In Carroll vs. Safford, 3 How, R. 441, the Supreme Court of the United States held that "in case of controversy, a court of equity is the proper tribunal to prevent an injurious act by a public officer,
for which the law might give no adequate redress, or to avoid
78 a multiplicity of suits, or to prevent a cloud from being cast over the title."

Equity rejoices more in the exercise of her power to prevent than in that of redressing injuries; and the injuction has been well called the right arm of her authority.

If the defendant in this case were to obtain a patent for the land in question, it would enable him to bring his action at law in California to recover the possession and oust the complainant, notwithstanding the equitable title of the latter. Without the patent, he cannot maintain any such action. Nor is it in the constitutional power of that State to authorize him to recover the land from the defendant unless he have obtained a patent. Wilcox vs. Jackson, 13 Peters, 498.

To issue the injunction in this case will prevent that litigation. Complainant is in possession of the land under the pledged faith, and
by positive contract with the United States for a valuable
79 consideration. He is entitled in equity to a patent for this land. This court has obtained jurisdiction over the cotroversy. Without its intervention the defendant, whose claim is also under a professed grant from the government, and is void, as we have seen, may obtain the means of turning out of possession the rightful equitable owner, through measures of additional and expensive litigation, to end, possibly, in the defeat of justice, or in its establishment at a ruinous cost, and after protracted delay.

But it has been asked in the argument of the case why not refuse the injunction, and then dismiss the bill, so that this controversy may be settled by the courts of California? That to assume jurisdiction over this cause in this district, would be an unjust imputation upon the courts of that State.

To this, it is enough to say in answer, that I entertain the highest regard for the learning and integrity of those courts, and have not a
doubt that in all cases the cause of justice may be safely en-
80 trusted to their protection, as to that of any court in the land.

But that is not a question which I have a right to consider. Complainant and defendant are both found within our jurisdiction, and this suit has been instituted in this court, and process served upon the defendant. The suit is here and is to be considered judicially. If we have jurisdiction according to established principles of the law, we must decide the question in the cause, without considering whether some other court might not have been better able to decide them than ours is. Besides a suit of the character of this one can

only be brought and relief obtained against the defendant personally; and how can this court determine whether it is or is not the purpose of the defendant ever to return to California? If he should not, then complainant would have lost his present remedy, without obtaining the other.

An injunction will, therefore, be granted on the present motion, prohibiting the defendant from accepting from the government
81 of the United States a patent for the land in controversy, to continue in force till the final hearing of the cause.

ANDREW WYLIE.

Replication.—Filed Oct. 2, '66

In the Supreme Court of the District of Columbia, in chancery.

Replication.

LEVI H. WHITNEY
vs.
JNO. B. FRISBIE.

This repliant, saving to himself all just exceptions to the defendant's answer, &c., for replication thereunto, saith that he doth and will aver, maintain and prove his said bill to be true, certain and sufficient in law to be answered unto by the said defendant, and that the answer of said defendant is uncertain, evasive and insufficient to be replied unto by this repliant, all which matters and things this repliant is ready to aver, maintain and prove as this honorable court shall direct, and humbly prays, as in and by his said bill he hath already prayed.

WALKER & STANTON,
Solicitors for Complainant.

82 In the Supreme Court of the District of Columbia, November term, 1866.

Answer to amended bill.—Filed Jan. 4, '67.

LEVI H. WHITNEY, plaintiff,
vs.
JOHN B. FRISBIE, defendant.
} Answer to amended bill.

The answer of the above-named defendant to the amended bill of complaint of the above-named plaintiff:

This defendant now and at all times hereafter saving to himself all and all manner of benefit or advantage of exceptions or otherwise that can or may be had or taken to the many errors, uncertainties and imperfections in the said amended bill contained, for answer thereto, or to so much thereof as this defendant is advised it is material or neces-

sary for him to make answer to, answering says, that he does not admit, but on the contrary denies that there is any controversy
83 between the complainant and defendant in the Interior Department of the government, as stated by the complainant, this defendant insisting that the party opposing the claims asserted by the complainant is the government of the United States; that the rights of the defendant to said land are valid and complete against the government of the United States, under the laws thereof and the acts of the officers of the government in the administration of said laws. And this defendant has not been informed save by the complainant's amended bill, and cannot set forth as to his belief or otherwise whether the complainant has or has not been denied by the Secretary of the Interior or any officer of the government an investigation of his alleged proofs in support of the claims set up in the amended bill.

This defendant admits that the surveyor general of California suspended action with reference to surveying the land in question as public lands in obedience to orders sent to him on or about the date stated in the amended bill by the Commissioner of the Gen-
84 eral Land Office, and he alleges that such order was given by the Commissioner of the General Land Office, so far as it is known to or understood by the defendant, in the discharge of his official duties, according to his own views thereof, on the circumstances of the case.

That it was known to such Commissioner that the defendant continued to claim said lands on the ground that his original title, that of the Mexican grant to Vallejo, was meritorious and was entitled to confirmation under the treaty with Mexico, and that at that time the defendant, still continuing in possession of said lands, was pressing before Congress his claim for the confirmation of his rights of possession ; and the defendant says that all the knowledge gained by the Commissioner of the General Land Office on the subject was by his officially taking notice, according to the usage of the Land Department, of claims pending before Congress, of the action of Congress, and the committee thereof concerning such claims; and this de-
85 fendant believes and says, that all action taken by said Commissioner in relation to said lands was solely and entirely owing to the information that he thus procured, and in discharge of what the Commissioner regarded as his public and official duties, and entirely without interference therewith effected or attempted by the defendant; and this defendant further answering denies that the order charged in the amended bill was issued at his suggestion or by his solicitation, and he says, that he made no solicitations whatever to the Commissioner of the General Land Office, as charged in the petition; nor did he make any suggestions to him in relation to said lands any further than to make known to the Commissioner the grounds of his claims to said lands, precisely as stated by the defendant in his memorial to Congress, and the evidence in support thereof, which is annexed hereto and marked exhibit A, and prayed to be taken as a part of this answer, which was then on the files of Congress

86 as a public document, and by referring the Commissioner to such documents as evidence of his claims, all which information and facts, as already stated, the defendant believes and says, the Commissioner had full knowledge of, on account of the universal practice and usage of the Land Department to notice all proceedings in Congress touching the public domain, and because it is the common practice of the Committee on Public Lands in Congress to confer with the Land Department in relation to all claims against the public domain; and the defendant further answering says, that it was a matter of public notoriety in Congress and in the Land Department that the claim of the defendant was pending before Congress and being carefully investigated on the merits, and the defendant believes and says, that members of the Committee on Public Lands in the House of Representatives officially conferred with the Commissioner respecting said claim while the same was pending, so that, by this means,
87 the Commissioner had the means of procuring in the most full, reliable and accurate manner all the facts touching the claim of said defendant as it stood at the time when any orders issued by him relating to said lands were made.

The defendant denies that he committed any acts of oppression or injustice against the complainant in relation to said lands or in the prosecution of his claim before Congress, or that he urged or requested the Commissioner of the General Land Office to commit or allow any act or deed injurious or oppressive to the complainant.

The defendant further answering says that any instructions given in relation to said lands by the Commissioner of the General Land Office to the register and receiver in San Francisco were given by such Commissioner exclusively on his own motion, and so far as is known to the defendant without the suggestion of any person. Defendant denies that he ever in any way influenced or sought
88 to influence said Commissioner in relation to any orders made by him touching said lands.

This defendant further answering says, he denies all fraud, oppression or unjust dealing of any kind charged or intended to be charged against him in the complainant's amended bill, and he denies that the complainant was prevented from proving his pretended right of pre-emption until after the passage of said act of Congress of March 3, 1863, by any management or act of this defendant, and he denies that he has molested the complainant, as alleged by him, or that he has taken his crops, or forced him into litigation. As stated in defendant's answer to the original bill, the defendant before the filing of said bill had sued the complainant in the State courts of California to recover the possession of parts of said land, and would be entitled in such suits to recover possession from the complainant on mere proof of his prior peaceable possession, for the entry of the complainant thereon was illegal, surreptitious and accompa-
89 nied with such force and violence as to constitute a breach of the peace; and therefore this defendant never has in contemplation of law been deprived of his legal possession of said premises; and the complainant never has at any time been in such posses-

sion of any part of said premises as to constitute a lawful possession or to be the basis of the right of pre-emption thereto.

The defendant further answering says, that as the government of the United States never dispossessed him from said premises, but without any interruption of his previous possession begun under the Vallejo grant, gave to him and the other claimants under Vallejo the right to continue in possession of said lands as purchasers thereof, said lands never were offered for sale as public lands under the general pre-emption laws, and the complainant therefore never had any color even of right for entering upon the possession of the defendant.

The defendant further answering says, that the complainant never planted any crops upon said lands and never placed any erec-
90 tions of any kind thereon worth over one hundred dollars. Whereas the defendant always has cultivated and still is cultivating all of said land claimed by plaintiff, with the exception of a small patch of about a quarter of an acre in extent on which stands a temporary shed thrown up by complainant as a mere pretence on which to erect a settlement right.

The defendant further answering denies that the surveys of the township including the land aforesaid were completed, or that the surveyor general of California was ready to return the plats thereof in to the general office at San Francisco prior to the passage of said special act of Congress, as alleged in the petition.

And the defendant also further denies that upon the return of said plats that the plaintiff would have been entitled to enter said lands.

In answer to the charge in the amended bill that complainant was ready to make his proofs under the pre-emption laws, the defendant denies that there were any grounds upon which such proofs
91 could be offered; and denies that the facts alleged lay the foundation for any such proofs; on the contraay thereof the defendant distinctly charges that the facts with reference to cultivation and improvement of the lands were specifically found and determined against the complainant by the register and receiver, as is stated by them in their reports of the 2d of January, 1865, and May 5th, to the Commissioner of the General Land Office, which report is annexed hereto and prayed to be taken as a part of this answer and marked exhibits B and C, in which report it is stated that none of the settlers who went on the Soscol lands since the grant was rejected by the Supreme Court have attempted regular improvements or cultivation, and that a few had harvested the grain planted by the prior possessors, and offer this as evidence of cultivation.

And this defendant further states that immediately after he had sworn to the answer to the original bill filed herein, he left this city and sailed at once from the city New York for the port of San Francisco before the amended bill was filed, and he had no
92 notice of such amended bill in time to file an answer thereto within the time required by the practice of this honorable court, and that so soon as he was informed that such amended bill was filed by his agent in Washington, he telegraphed to his agent

that he would start from California for the city of Washington without delay, for the purpose of making answer to such amended bill, and accordingly did start without delay and in the shortest time practicable and came direct to Washington, and now prays that the court will order the decree pro confesso entered herein for the want of an answer to the amended bill be stricken out, and that leave be given the defendant to file this answer to said amended bill of complaint.

And this defendant submits to this honorable court that all and every of the matters in the complainant's amended bill mentioned and complained of are matters which may be tried and determined at law, and with respect to which the complainant is not en-
93 titled to any relief from a Court of Equity; and this defendant hopes he shall have the same benefit of this defence as if he had demurred to the said amended bill.

And this defendant denies all and all manner of unlawful combinations wherewith he is by the amended bill charged, without this, that there is any other matter, cause or thing in the said amended bill contained material or necessary for this defendant to make answer unto and not herein and hereby well and sufficiently answered, confessed, traversed and avoided or denied, is true to the knowledge and belief of this defendant; all which matters and things this defendant is ready and willing to aver, maintain and prove as this honorable court shall direct, and prays to be hence dismissed with costs, &c., in this behalf most wrongfully sustained.

JOHN B. FRISBIE.
JOS. H. BRADLEY,
Sol. for Def't.

John B. Frisbie makes oath according to law that the facts stated in the foregoing answer as of his own knowledge are true, and he believes those to be true which are stated therein on the information of others.

17 Dec., 1866.

Test: R. J. MEIGS, *Clerk.*

94 *Exhibit A, to answer to amended bill.—Filed Jan.* 4, '67.—*Memorial.*

To the honorable the Senate and House of Representatives of the United States of America in Congress assembled:

GENTLEMEN: Those of your fellow-citizens who have purchased in good faith and for a valuable consideration the lands of the rancho Soscol, situate in the counties of Solano and Napa, and State of California, who see their homes and their all to be wrested from them by

the recent adverse decision of the Supreme Court of the United States touching that rancho, appeal to your honorable bodies for relief. They are impelled by the universal opinion of all good citizens of the State of California, acquainted with the facts, in sympathy with their hardships and in approbation of the justice and equity of their requests; by the expressed opinions of those eminent jurists, Justices Grier and Wayne, as set forth at length in their several documentary opinions in the case whereon the title to Soscol was tried; by the knowledge of the undoubted right of their position and their reliance upon the disposition of your honorable bodies to do justice to all citizens of the republic, however humble, to carry out in good faith the treaty of Guadalupe Hidalgo, and to protect rights, or supposed rights, acquired in the faith of that treaty, and the decisions of the tribunals established for the investigation of land claims in California.

95

They beg leave to refer your honorable bodies to the different papers accompanying in support of their position. There will be found an able and succinct statement, prepared by Mr. R. C. Hopkins, a gentleman connected with the custody of the Mexican archive from the formation of the board of U. S. land commissioners, than whom no person in California is more competent to exhaust the question he discusses. There will also be found all material proceedings in the case before the land commission and District Court of the United States, with the latter of which is incorporated the opinion of Mr. Justice McAllister, of the California court.

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There will also be found the depositions of sundry citizens of California of standing and respectability upon the subject, a memorial from sundry purchasers under the title, with map in the hands of the delegation from California, and other matters; all of which combined present a mass of proof of the equity of the claim which may well be deemed invincible.

It may be asked, why was the additional proof here presented not offered before the courts? In answer, it must be said, that the claim was so universally conceded to be just and genuine, that opposition thereto was so purely nominal and technical, that the grantee and his assignees were lulled into a false security, from which they were rudely awakened by the action of the Supreme Court, based upon objections, as Mr. Justice Grier remarks, suggested in that tribunal for the first time.

It is not, however, proposed to argue this case. Your petitioners simply offer the facts of the case for consideration, throwing themselves upon the justice of Congress—upon its generosity.

97

if that may be called generosity which does not embarrass the donor, but which gives comfort, peace, home, nearly all, in fact, that renders life desirable, almost life itself to the donee.

They pray that, in the proper and just exercise of congressional power, the title of the rancho may be confirmed to the assignees of General M. J. Vallego, confident that their reliance is not misplaced.

Your petitioners, with respect and submission, trust their fortunes in the keeping of your honorable bodies.

(Signed)

John B. Frisbie,
D. N. Hastings,
L. B. Bell,
Jabez Hatch,
S. C. Hastings,
Andrew Goodyear,
Jacob R. Daniels,
Thomas P. Maddon,
John M. Neville,
W. W. Chapman,
98 W. F. Peabody,
R. W. Dillon,
John Knight,
A. P. Ryenson,
John Curry,
John Kelley,
John Burcham,
Joseph Fisher,
John Gerager,
Charles Deming,
J. Francis Deming,
Manuel Vera,
Andrew Hunter,
James Hunter,
John Finnell,
Simpson Finnell,
John Clinkinberd,
Thomas Burrill,
John Thomas,
Thomas Evans,
Perry Durbin,
Mary C. Harbin,
99 Leonard Schouse,
Christian Raven,
C. A. Eastman,
L. C. Fowler,
J. F. Houghton,
John Stilks,
Perry Schouse.
A. Powell, jr.,
John M. Bowles,
Peter Fagan,
John Tomy,
Isaac Lankershim,
Beemas & Hynes,
James Hill,
James Thompson,

James Logan,
Charlotte Dennison,
Daniel Williamson,
Edward H. Roe,
Henry Hannibal,
Levi C. Frisbie,
Thomas Mathews,
Ira Austin,
Stephen Klink,
Nathaniel Klink,
Sylvester Woodbridge, jr.
Edward Frisbie,
Thomas Morzan,
B. C. Whitman,
W. S. Wells,
Charles Ramsey,
Henry Blackman,
Louise Van Loon,
Robert Sheehy,
Samuel Randall,
Patrick Carroll,
John Watson,
Peter D. Baly,
Hannah Davis,
Benjamin Walls,
Alexander B. Grogan,
F. S. Spring,
Faxon D. Atherton,
Thomas S. Page,
G. Poor,
Charles Buckhardt.
F. P. Wyman.
Simpson Thompson,
Edward McGeary,
J. W. Jones,
Mary Williams,
Thomas Thompson,
John Brounle,
Joseph Wilson,
John Halliman,
C. S. Place,
George Reeves,
R. C. Gillespie,
Geo. Watson,
John Williams,
Robert Brounlee,
John Wilson,

Eleazer Frisbie,	Rudolph Miller,
Patrick Fogarty,	J. C. Rounds,
James Glassford,	J. B. Thomas,
Mary Fall,	C. A. Morse.

100 *Exhibit "B" to answer to amended bill.—Filed Jan.* 4, '67.

GENERAL LAND OFFICE
December 17, 1866.

I, Joseph S. Wilson, Commissioner of the General Land Office, do hereby certify that the annexed printed copy has been carefully compared with the original and with the manuscript words, paper A, hereto annexed, added after "1864," on the sixth line from the bottom of the first page of said printed paper, is a true and literal exemplification of the report on file in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.] JOS. S. WILSON,
Commissioner of the General Land Office.

101 U. S. LAND OFFICE, SAN FRANCISCO,
January 2, 1865.

Hon. J. M. Edmunds, Commissioner of the General Land Office:

SIR: In respect to the matter of the contests for lands on the "Rancho of Soscol," in this district, submitted to us for the reinvestigation by your letter of instructions, bearing date the 10th day of March, A. D. 1864, we beg leave to submit the following general report of the proceedings had therein.

Upon the receipt at this office of said letter of instructions, in May last, the notice therein provided for was immediately published in the "Daily San Francisco Evening Bulletin," a newspaper having, in our judgment, the largest circulation upon said rancho.

In that notice we fixed upon the 6th day of July, 1864, as the day for the commencement of said investigation—a day more than six weeks from the first pulication, as was required by your said instructions.

102 Upon the appearance of the first issue of said paper containing said notice, we were applied to by a large and respectable body of the persons in interest, who represented that all concerned were then ready to proceed with the investigation, and that it would give universal satisfaction to have the time shortened to the 8th day of June, 1864. This we immediately notified you of telegraph, and upon obtaining your permission, which we did by the same means, the time was shortened to the 8th of June 1864, publishing said change in the "Evening Bulletin," and also in the "Daily American Flag," out of extra caution, that all might have full notice of the time. This change gave entire satisfaction to all parties.

On the 8th day of June, at 10 o'clock a. m., all parties, both

claimants under the special act of Congress and contestants under the general pre-emption laws of the United States, accompanied by their respective counsel, and also by a throng of witnesses,
103 duly appeared at this office, and announced themselves as ready to proceed with the investigation.

The trials were accordingly commenced, beginning with No. 1 on the schedule, and regularly carried on from day to day until about the 27th day of December, when they were finally closed, all the testimony in all the cases having been taken in due form.

The trial of these cases has occupied the register and receiver constantly every working day, as well as evenings, for near eight months, during which time between two and three thousand witnesses have been sworn and examined, and their testimony reduced to writing, and between four and five thousand deeds, documents, affidavits and the like introduced and examined.

At these trials, in accordance with your instructions, each party had the amplest opportunity of cross-questioning the witnesses of the other, and of objecting to and making arguments upon the admissibility, relevancy and competency of all classes of testimony presented to the tribunal.

104 These privileges were taken advantage of to an almost unlimited extent, cross-examination of a single witness consuming, in many instances, several hours.

The same liberal course was adopted in respect to the number of witnesses. We permitted parties to produce additional witnesses on each side as long as they desired to do so without check or hindrance, understanding it to be your desire to probe the entire subject-matter to the very bottom if possible.

No case was closed as to testimony so long as either party claimed that they had other witnesses or additional evidence bearing upon the controversy which they desired to produce.

Before concluding any case we have been careful to observe that your instructions have been carried out in every, even the minutest, particular.

The errors and omissions in the former proceedings, had by our predecessors, to which our attention was directed, have been carefully noted on the schedule and corrected, as will appear by
105 said record when the same shall be transmitted to the General Land Office.

A full and complete docket has been kept up into which the judgments or awards, together with a brief statement of the contest, facts proven, names of witnesses, description of the land and the like, have been entered as the same have been transacted.

These books, as well as the "schedule," cannot be transmitted to the General Land Office until all the cases are finally written up and completed, being necessarily delayed here for that purpose.

All the co-terminous claimants have been required to come forward and subscribe and make the affidavit in form provided for by your letter of instructions.

Where Vallejo claimants have declined to subscribe the applica-

tion, or to make proof of purchase or possession, the reason has been ascertained as near as could be and carefully noted in the record.

106 The best evidence of purchase under Vallejo, viz., the deeds of conveyance, has, in every instance, been required and furnished.

Where parties have acted in a representative capacity, as in case of attorneys-in-fact, administrators and the like, the same best evidence has been also required and produced of that character or delegated authority.

Nothing now remains to be done on our part but to copy the deeds and documentary evidence, and to append to each case in its order a special report containing our joint opinion upon the facts, and also the supplying of certificates and such matters of form as may have been overlooked in the progress of the trials.

The vast number of the deeds and documents to be copied at this office will prevent our sending forward the last of these cases for several months to come; nevertheless we beg leave to say that we have been and shall continue as diligent in the prosecution of this work as possible, and will forward them all complete with the utmost despatch.

107 In the mean time we have determined to finish up the cases in their regular order on the schedule and to forward them on in installments as fast as finished, so that each month a certain number will arrive at the General Land Office.

In accordance with that determination we have worked up and finished cases No. 1 to No. 10, inclusive, which we herewith transmit to you.

It contains the testimony and documentary evidence in these cases complete, with our opinion and finding of facts specially appended to each case.

These cases are complete, but the schedule and docket, as we said before, cannot be transmitted without cutting it apart till all the cases are finished and forwarded, as they must remain here in order that entries may be made in them of the special opinions, &c., in the unfinished cases.

This plan is the best we could devise in order to despatch the business, and we sincerely hope it may meet with your approbation.

108 From the testimony taken in these cases we have agreed upon what, in our opinion, are the general facts which underlie the subject in controversy, and beg leave to make a report of the same.

There may be, and perhaps are, occasional exceptions to the general facts, but as each case will have attached to the record a special report of the particular points therein established, it is unnecessary to note here exceptional cases, even if there be such.

A general report of the facts established by said evidence is briefly as follows: When the United States government took possession of California, Don Mariana Guadaloupe Vallejo was in the oc-

cupancy of the rancho of Soscol, claiming to own it by virtue of the grant from the Mexican nation, which has recently (December term, 1861) been declared invalid by the Supreme Court of the United States. His occupancy was the usual one of the country and in accordance with the primitive habits of the people. He possessed the land by herding stock upon it. General Vallejo, as mili-
109 tary commandante of his district, consisting of all Alta California lying north of the bay of San Francisco, was necessarily the leading personage of the country. His influence among the rude inhabitants of the Territory was almost monarchical, and his establishment was in accordance with his influence. His residence at Sonoma was the capital of his commandancy, and the people of the country for hundreds of miles around looked to General Vallejo for advice and assistance in business and for protection and defence in time of trouble. These things are part of the history of California.

He had other ranchos besides that of Soscol, as that at Sonoma, which was devoted to agriculture and residences.

The Soscol he especially devoted to the herding and grazing of stock, for which purpose it was most admirably adapted. Wild oats grew in great luxuriance all over this tract, from the water's edge to the tops of the highest hills, and being surrounded on three sides by the waters of the bays and rivers, required little attention in the way of herdsmen.

110 On this rancho General Vallejo kept as many as fifteen thousand head of horses and horned cattle running at will, attended only by the necessary vaqueroes employed to watch and attend them.

There was no other use to which the land could at that time be devoted. The want of reliable labor and lack of a market both forbade agricultural operations beyond personal or family necessities. It was not practicable then, nor for years after, to put the land to any use other than stock pasturing.

We have therefore to report that the possession that General Vallejo had of "Soscol" in 1846 was the usual use and possession of the time and the country, and that it was the best and most perfect use and occupation of which the land was capable.

The rancho was therefore reduced to possession by General Vallejo before the Americans took possession of the country.

111 Soon after the American occupation or conquest, General Vallejo began to sell off portions of the "Soscol," and continued this practice until about the year 1855, at which time he sold the last of it, and does not appear to have had or claimed any interest since.

This sale and consequent dividing the land into small parcels produced its usual effect in the way of improvements.

From 1855 to 1860 the "rancho of Soscol" was almost entirely reduced to absolute and actual possession and control by his vendees, being by them fenced up into fields, surrounded by substantial enclosures, and improved with expensive farm-houses, out-buildings, orchards, and the like, and was cultivated to grain wherever suitable for that purpose.

It had upon it two cities of considerable importance, viz: Benicia and Vallejo, each of which had been at one time the capital of the State of California.

No rural district of California was more highly improved than this, and but a very small portion equal to it.

112 The title to "Soscol," before its rejection by the United States Supreme Court, was considered the very best in all California. All the really valuable agricultural land in California was held under Mexican grants, and as a consequence, all had to pass the ordeal of the land commission.

From 1853 to about 1860 very few had been finally passed upon by the courts, so that during that time the question for the farmer to decide was not what title is perfect, but what title is most likely to prove so by the final judgment of the Supreme Court.

Amongst the very best, in the opinion of the public, stood "Soscol."

One conclusive, unanswerable proof of that fact is this, that there was not a single settler on the grant at the time it was rejected. Not one person on it, except in subordination to the Vallejo title. Every resident on the whole tract held his land by purchase from Vallejo, or his assigns, and held just precisely the land so

113 purchased, and not one acre more or less. This fact was not even disputed during the whole eight months of investigation through which we have just passed. It is a notorious fact that of the grants in California which have stood the test of the Supreme Court, very many have been entirely in the possession of squatters, and all with more or less of such possessions, and the final patent has alone succeeded in recovering the long-lost possession to the grant holder. There were no settlers on the "Soscol." The people had the most perfect confidence in the title. It had been twice confirmed by tribunals of high authortity and great learning—first by the United States land commission, and then by the District Court of the United States.

It only wanted the final confirmation by the Supreme Court, and none doubted that it would follow of course. Business could not, and would not await the nine years consumed in adjudicating this title. Farmers were obliged to have lands, and they bought them. Capital must and would seek investment, and it was lent on

114 mortgage. When all titles required the same confirmatory decree, the citizen could not discriminate, but exercised his best judgment.

The sales of lands upon the "Soscol" were made at prices which called for perfect title; they brought the full improved value of the land. Money was lent on mortgage in the same way.

The deeds and mortgages, which accompany the respective cases, are the very best evidence of the opinion the public entertained of the character of the Soscol grant title. The people were amazed when it was announed that the Soscol grant had been rejected.

No fact developed by this examination has appeared so surprising to the mind of the register and receiver as that there were no pre-

emption settlers on the "Soscol." This so unusual in California that we expected to find the contrary. There was no possession on the tract adverse to the grant title.

Thus stood matters until early in the year 1862, when the intelligence reached California that the grant had been rejected by the Supreme Court. The struggle soon began. There was at
115 that time employed upon the United States navy yard at Mare Island, and also upon the Pacific Mail Company's works at Benicia, a large number of mechanics and laborers. There was also in the towns of Benicia and Vallejo a large floating population. Tempted by the great value of these lands in their highly improved state, many of these persons squatted upon the rancho.

The landholders in possession resisted.

The houses of the great majority of the settlers were erected in the night time, as it was necessary to enter the enclosed fields by stealth. These houses were built of rough redwood boards set up edgewise, with shed roof, and without window, fire-place, or floor. They were about eight feet square, sometimes eight by ten feet, and never over six feet high.

We have no hesitation in saying that they were utterly unfit for the habitation of human beings, and further that they were never designed for permanent residences. The mode of erecting these shanties was as follows: The planks were sawed the right length in the
116 town of Vallejo or Benicia, in the afternoon of the day, and at nightfall were loaded upon a cart. About eleven o'clock at night the team would start for the intended settlement, reaching there about one or two o'clock in the morning. Between that hour and daylight the house would be erected and finished. Sometimes the house would be put together with nails, but when too near the residence of the landholder in possession, screws would be used to prevent the sound of the hammer attracting attention. Very few of this class of settlers remained upon their claims above a few days, but soon returned to their ordinary occupations in the towns.

Generally after they would leave the landholders would remove the shanty from the ground. In some cases they would pull them down with force immediately upon discovering them, and in the presence of the settlers.

A few of them got settlements near enough to their places of employment to enable them to work in town, or at the navy yard, and to sleep in their shanties; some regularly, others only oc-
117 casionally. These generally remained longer than the others, but none of this class have remained up to the time of trial.

None of the settlers, who went on since the grant was rejected, have attempted regular improvements or cultivation. A few have harvested the grain planted by the landholders, as it grew on their $\frac{1}{4}$; they would harvest it, and offer this as evidence of good faith and cultivation.

We have no hesitation in pronouncing, from the evidence, that these are not settlers within the spirit of the pre-emption laws, but are mere speculators, desirous of getting the improvements of another to sell and to make money.

There are on the Soscol a few persons who claim pre-emption rights, but who occupy a different position from the above. They are persons who, before the rejection of the grant, purchased small parcels of land under Vallejo, of quantity less than 160 acres, say from 10 up to 70 or 80 acres. This class of persons, with some exceptions, desired to extend their boundaries, so as to include 160 acres,
118 the amount allowed by the general pre-emption laws of the United States. This they could only do by taking in the land of their co-terminous neighbors, who had bought and were holding under the same title with themselves. Those who would lose by this enroachment strenuously objected, and contests and conflicts were the speedy result.

This last described class of settlers have permanent improvements upon the Vallejo lots; reside upon them, and generally are engaged in agriculture, but in no case have they obtained possession of, or improved land outside of their Vallejo lines of purchase. In a few cases these lots have been situated so as to embrace the corners of several quarter sections. When this has occurred, there are several instances of the Vallejo purchaser of such small lot permitting settlers to enter his ground and build shanties upon that part of the lot which would corner on a quarter section, so that two or three pre-emption settlements would be broken up, and improved by
119 using the small lot as a base of operations. The records of the cases, which accompany this report, are about an average specimen of all the cases on the rancho. There is a remarkable sameness in all the cases. In making up the records, before forwarding them to you we shall carefully examine each case, and will report specially the peculiar facts involved therein, as appear by the evidence. This you will find we have done in the cases transmitted herewith. The cases, with a few rare exceptions, are all alike. They present the same leading features. Purchase at high prices, uninterrupted possession, valuable improvements, and continued cultivation on the part of the holders under Vallejo, and a fierce, resolute struggle to oust them from the land on the part of the settlers, commencing with the rejection of the grant. We feel confident in making this report, because of the fact that it is sustained by undisputed testimony. There is no conflict of testimony on these points, very many of the most important facts having been brought out on cross-examination of witnesses whose interests were in favor of their suppression.

120 In your letter of instructions of March 10, 1864, you also enjoin upon us the following duty, viz: You are directed, if any cases have been entertained by you falling within the interdicts of the law and the aforesaid original instructions of April 10, 1863, which contemplate the exclusion of claims to any tract within the limits of the Soscol which have been, is, or should be reserved for military, naval, or other public uses, to make special notes in the records of the inadvertence of any awards so conflicting with the aforesaid terms of interdict and exclusion, and promptly advise the claimants of the illegality of such claims. In regard to all unex-

ceptionable cases you will append a certificate to the end of your final report, stating the fact that none of such cases fall within the aforesaid interdict and exclusion of the statute and these instructions. You will also expressly report whether or not there are other tracts within the Soscol, not now existing as reservation, which
121 should be further reserved for public uses, and will state the reasons of propriety for any of this class which you may recommend for reservation. In respect to the subject of reservation, to which our attention was thus directed, we have the honor to report as follows:

In order that our report might be as perfect as possible, Mr. Swift, the register, visited the Soscol rancho, as well as the navy yard at Mare island, which lies adjacent thereto, for the purpose of getting information upon the subject. Upon strict inquiry and careful examination, we have learned as follows: The only lands upon the "Soscol" which have at any time been reserved and occupied by the United States government, for any purpose whatever, is the tract near the city of Benicia, known as the "military reservation." This embraces several hundred acres land, which was conveyed to the United States by Robert Semple and Thomas O. Larkin,
122 (grantees of Don M. G. Vallejo,) and was continued in the occupation of the government ever since. The land embraced in this reservation is ample in quantity for all military purposes, present or future, and is the only tract on the "Soscol" which is deemed of any utility for public purposes.

Prior to the location of the navy yard on Mare island, it was a question whether the point of land upon "Soscol," lying upon the Straits of Carquinez, and upon Napa creek, or the island, was the best adapted for that purpose. In 1852 Commodore Sloat was directed to make the selection, which he accordingly did. After a careful survey of the harbor, he settled the question of location in favor of the island, pronouncing it (it is said) one of the best sites in the world for a great naval depot, on account of its admirable position for defence, the great depth of water close to its banks, and its ample area. The government adopted this view, con-
123 firmed the selection, and very soon after purchased the island. No further notice being taken of the opposite point, which was then, and still continues, in possession of parties holding under the Soscol grant, and is wholly devoted to cultivation, except that part upon which stands the town of Vallejo. Mare island appears to be ample in area for all conceivable naval purposes, but a very small portion of it being used for the navy yard.

The point opposite Mare island, embracing the town of Vallejo and a number of improved farms, is neither necessary for, nor adapted to, any public use, nor does it fall within the interdict of the Soscol act, or the letter of instructions from the General Land Office, above referred to.

The Benicia military reservation has been expressly left out in the surveys of the Soscol, and no part of it has been applied for by either party in said controversy. The same has been the case with respect to the towns of Benicia and Vallejo.

124 We have, therefore, to report that no part of the applications in these cases, on the lands claimed, fall within the interdict of said act of Congress, or said letter of instructions. We further beg leave to report that no application has been entertained for mineral lands, as there are none of that class upon the Soscol rancho.

We further report that, in our opinion, there is no necessity for the making of any other or further reservation for military, naval, or other public purposes, of the lands of said rancho, their being already ample provision for all such purposes, present or future, in that of Benicia and Mare island, already referred to in this report.

Your letter of instructions also contained the following requirements, directed to us, viz:

Further. In order that this business may be completed at the district land office, you will specially report the exact extent, in
125 connection with the lines of the public survey, of the towns of Vallejo and Benicia, and the particular subdivisions claimed by the corporate or other authorities under the town-site act of the 23d of May, 1844, and what action or adjudication you may have had on any application under said act, as contemplated under the sixth head of said iustructions of 10th April, 1863.

You will also report what action, if any, has been had by the register and receiver, under color of any statute on claims, including said town; and if any claims to said towns, or any other town sites within the Soscol rancho has been admitted by said register and receiver, you will make a detailed report of the facts.

In respect to this requirement we have to report that no action whatever has been taken under said special act of Congress, or any town-site act, by the town of Benicia, Vallejo, or any town or village on the Soscol. We have received no communication from
126 them, and have no means of knowing what is the extent of their claim to lands upon the rancho. We have taken no action at this office in respect to any such town sites.

We believe that the town authorities are content with the action of the surveyor general in leaving out of the survey said towns. No plats of any town on the Soscol have ever been filed in this office.

In conclusion, we would respectfully suggest, in view of the great amount of labor yet to be expended upon said cases at this office before they will be ready for transmission to Washington, that the department take them up in their order, and act upon them as they are sent forward from here. This course would be a great advantage to the parties in interest, inasmuch as it would greatly expedite a final adjudication and settlement of the controversy.

We have the honor to be, your very ob't se'v'ts,

(Signed) JOHN F. SWIFT, *Register*.

(Signed) JOHN W. SHANKLIN, *Receiver*.

127 *Exhibit "C" to answer to ame'd bill.—Filed Jan. 4, '6.*

GENERAL LAND OFFICE,
December 17, 1866.

I, Joseph S. Wilson, Commissioner of the General Land Office, do hereby certify that the annexed is a true and literal exemplification from the files of this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.] JOS. S. WILSON,
Commissioner of the General Land Office.

128 U. S. LAND OFFICE,
San Francisco, May 5, 1865.

In the matter of the contest between claimants of lands on the "Soscol rancho." Case No. 98.

Names of claimants under special act of Congress of March 3, 1863. John B. Frisbie.

Present: J. F. Swift, register; Jo. W. Shanklin, receiver.

The above-named case having been duly and regularly tried in its order on the schedule, in accordance with the circular of instructions from the General Land Office in that behalf, at which trial all parties in interest, as well as those claiming the lands by pur-
129 chase under Don Mariano Guadalupe Vallejo or his assigns, as those claiming the same, or any part thereof, by virtue of the general pre-emption laws of the United States, were present in person and attended by counsel, and all had full and ample opportunity to cross-question the witnesses of the other, all of which testimony and proceedings is hereunto annexed and made part of this record; whereupon the same was fully argued by said counsel before the register and receiver, and submitted for decision.

Now, at this day, after carefully weighing said testimony and deliberating upon the same, the register and receiver do find and report the following as the facts established by said evidence, and as the judgment and award in said case:

That the land applied for in the application in this case, and therein described, is a portion of the "Soscol rancho," in the State of California, referred to in said act of Congress of March 3, 1863.

130 That the above persons, whose names are subscribed to said application, are bona fide purchasers under Don Marina Gaudalupe Velejo, his assigns.

That said land was settled upon, improved, enclosed and reduced to possession by said persons or their grantors under said Vallejo about the 1st day of July, 1860, and had been and was so reduced to possession by said persons at and before the time the claim of said Vallejo to said rancho was adjudged to be invalid by the Supreme Court of the United States.

That said land is not mineral, nor is any part thereof mineral lands.

That said land is not nor has it ever been used, reserved or occupied by the United States for military, naval or other public uses, nor has any part thereof ever been so used, reserved or occupied.

That no part of said lands are required by or reasonably necessary to the United States for any such purpose.

131 Wherefore we do hereby award said land so described in said application to said applicants above named.

JOHN F. SWIFT, *Register.*
JAMES W. SHANKLIN, *Receiver.*

In respect to the claim of Levi H. Whitney to the SW. quarter of section No. 30 in township No. 4 north of range No. 3 west, Mount Diablo meridian, being part of the land in dispute in this case, the register and receiver, from said evidence, do find the following facts:

That at the time of the alleged settlement on said land, said pre-emption claimant was a citizen of the United States and the head of a family.

That at the time of said alleged settlement said land was fenced in, improved. in the actual possession of, and under cultivation by John B. Frisbie, Vallejo claimant in this case.

That said pre-emption claimant has resided upon said land
132 and put a valuable and permanent improvement, and there resided with his family. Wherefore his claim thereto is hereby rejected and disallowed, upon the ground that the land was not open for settlement, and has been withdrawn by the special act of March 3, 1863.

JOHN F. SWIFT, *Register,*
JAMES W. SHANKLIN, *Receiver,*

In the Supreme Court of the District of Columbia.

Motion to dissolve, &c.—Filed Jan. 4, 1867.

WHITNEY *v.* FRISBIE. } No. 734; Equity Dock. 8.

Before Justice Olin at special term.

133 The complainant having, by leave of court, granted on the day of , filed an amended bill in this cause, since the order granting the injunction on the original bill prayed for, and the defendant having filed his answer thereto on this 4th day of January, 1867—

The defendant now prays leave to move and does move the court, this 4th day of January, 1867, to dissolve the said injunction on the case made in the said bill and amended bill, original and amended answers, and the exhibits filed in said cause by the respective parties.

&c.

And further, he prays that his motion may be certified by this court, to be heard in the first instance in general term, according to the statute.

BRADLEY, *Sol. for Deft.*

Order certifying to gen'l term.—Filed Jan. 4, '67.

WHITNEY *vs.* FRISBIE. } No. 734; Equity Doc. 8.

The defendant's motion to dissolve the injunction on the case
34 made in said bill and amended bill, original and amended answers, and the exhibits filed in said cause by the respective parties, and the motion of defendant to have said motion certified to the court in banc, to be heard in the first instance, having been considered, it is this 4th Jan'y, 1867, ordered by the court that said motion be and hereby is certified to the court in banc.

A. B. OLIN, *Justice.*

Replication.—Filed Jan. 5, '67

LEVI H. WHITNEY *vs.* JOHN B. FRISBIE } Replication. 734 Eq.

This repliant denies the truth of the defendant's answer to the amended bill, and the sufficiency of the matter alleged in it to bar his suit; and he avers the truth and sufficiency of his said amended bill, and is ready to maintain and prove the same as the court may direct; and he prays as in and by his said bill he has already prayed.

FRED. P. STANTON,
Solicitor for the Complainant.

135 In the Supreme Court of the District of Columbia.

Complainant's testimony.—Filed Jan'y 21, '67.

LEVI H. WHITNEY, compl't, *vs.* JOHN B. FRISBIE, deft. } No. 734. In Equity.

DISTRICT OF COLUMBIA, *County of Washington, ss:*

I, Edmund F. Brown, an examiner in chancery, duly appointed by said court, do hereby certify that on Saturday the 12th day of January, A. D. 1867, it was made known to me by Frederick P. Stanton, esq., solicitor for the complainant in the above entitled cause, that it was desired that the testimony in behalf of said complainant should be taken orally before me at my office, No. 402 F street north, in the city of Washington, on Thursday next, the 17th inst., at 10 o'clock a. m.

Whereupon I ordered that the testimony should be so taken on

said day, and that notice of the time and place should be given to the defendant in said cause, and that the witnesses should be produced to testify in said cause.

136 *Deposition of Rob't Waugh.*

THURSDAY, 17*th January*, 1867.

In pursuance of the said order and notice, the parties appeared. Messrs. Stanton and Walker for complainant, and Mr. Blair for defendant.

Robert Waugh, being duly sworn, doth depose and say, in answer to interrogatories by Hon. F. P. Stanton, of counsel for complainant, as follows:

I am 43 years of age; my residence is in California, but at present I am stopping in Brooklyn, N. Y., under medical treatment. I have lived in California about 16 years. I know the quarter section of land on which Mr. Whitney resides; it is the southwest quarter of section thirty in township four north of range three west, Mount Diablo meridian. It has been disputed whether the land is in Solano or Napa county, California.

Mr. Whitney settled on that land in October, 1862. He built a house with three rooms and a cellar, dug a well, built a barn
137 or stable large enough to winter five or six head of horses; also a place to put hay for the season; also a chicken house and corral. He has occupied it since October, 1862, with his family. He ploughed part of the quarter section in the winter of 1862–3, as nearly as I can recollect, 25 or 30 acres. I did not see him sow it; I believe it was sown either by Mr. Whitney or the opposite party. Mr. Whitney raised a vegetable garden in the spring of 1863. He also cut from 50 to 75 acres of hay on the place in 1863. In the winter of 1863–4 he cultivated a large part of the quarter, I believe about 80 acres, either in wheat or barley, or both.

After 1863–4, when Mr. Whitney left home, his family several times attempted to cultivate, but was prevented by Mr. Frisbie's renters, except the raising of a vegetable garden, which they have done every year. They prevented his family from cultivating by violence.

The improvements made on the place by Mr. Whitney since
138 he settled there were worth, to the best of my knowledge and belief, from seven to ten hundred dollars in gold. Mr. Whitney had a large number of horses and mules when he went there. I do not know how many, he wintered five or six head during the winter, and ran two or more ploughs when he was cultivating the land.

That township was surveyed by the United States surveyor in 1862. I think it was finished about the first of October. The pre-emption settlers in that township paid to the surveyor general money necessary to have the surveys made, not only for that township but for the whole ranche. I paid part of it myself, and have seen others pay it. I am one of the pre-emption settlers in that township. I believe the return of the plats was suspended by order

of Judge Edmunds, Commissioner of the General Land Office, but I never saw the plats.
(Mr. Blair objects to what the witness says he believes.)

139 *Cross-examination.*

By Hon. M. Blair counsel for defendant:

I made my pre-emption on the 19th day of December, 1862. Prior to that time I was in the Soscol ranche, in the American canon, for a while in the summer of 1862, and before that a while at Barker plains, about 20 miles above, in 1861. I went from Baker plains to the American canon, the first time, in 1862. I continued on the ranche the greater part of the time after that. I went back up to Barker plains in the summer of 1862 for a short time, as near as I can recollect, about the 4th of July, and came back about the first of September to the canon, and remained in that neighborhood until the 19th of December. I had no home, but was working round in that neighborhood. I saw Mr. Whitney that fall, as near as I can recollect, about the fore part of October. He was not doing any
140 kind of work or business when I first saw him. I saw him on his own claim some time in October, and don't know whether I saw him before that or not. He was at work making improvements on his place. When I testified above I thought I had seen him before, but now I do not know whether I had or not. When I got acquainted with him he was making improvements on his place. I was not present the day he first went on the place. I had passed by the place before he went on it. There was a kind of a house and shanty occupied by renters when he went on it. I have seen them and talked with them, and know that they were Frisbie's renters.

X-interrogatory. Give me the names of these persons that you call Frisbie's renters; when it was that you saw and talked with them, and which of them it was that was in possession at the time that Whitney entered.

Answer. I do not know that I can call any of the names at present, but one; that was Shouse. I cannot recollect the date. I do
141 not recollect the name of the one who was in possession at the time that Whitney entered. I lived all round that neighborhood, where I could get work. I did not continue in that neighborhood all the time, and do not recollect the dates when I was away. It is so long ago that I cannot recollect the times. A part of the time that I was away, and the greater part, I worked round Vallejo and Benicia, and different parts of the Soscol ranche. I was at work at farming, sometimes by the day and sometimes by the month. I worked for a Mr. Carter, 3 miles from Vallejo, in 1865. In the fall of 1862 I worked for Mr. Turner on the Soscol ranche, in September, a short time by the day. I can't recollect every man I worked for, but I worked for Mr. Welcome Fowler after that, the next spring. I did work between September and the spring a while for a man named Oakley, hauling wood to Vallejo.

2d x-int. State your employment, by whom employed, and where, successively, from the time you were employed by Turner till
142 you entered the employment of Welcome Fowler.

(Objected to by Mr. Walker as irrelevant.)

Answer. I had acquaintances in that neighborhood, and a good part of the time after I left Turner I did not work. I then worked for Oakley, not over a month, and then went to stay with my friends again until I went to work for Welcome Fowler. I think it was in the month of January I went to work for Oakley. I did not do anything to amount to anything between September and January. I hauled wood for Oakley from Oakley's place to Vallejo. It was in December of that year, while I was living with my friends, that I made my claim.

(This last answer objected to by Mr. Walker as not being relevant.)

My claim is situated in Napa county, the southwest quarter of section 11, township 4 north, range 4 west.

(Objected to by Mr. Walker.)

My claim is probably 3 or 4 miles from witness' claim, and 3 or 4 from the canon where my friends are living with whom I was staying.

(Objected to by Mr. Walker.)

143 I was on my claim at the time I made it. I was staying with my friends before and after. I staid on my claim not very long, until the house was torn down and hauled away by a mob of 17 men. I was only on it a few hours.

(Objected to by Mr. Walker as irrelevant.)

I went on it in the night.

(Objected to as irrelevant.)

Different men claimed the quarter section I was on, under Vallejo.

(Objected to as before.)

They were Fagan, Formey, Middleton and Close.

(Objected to as before.)

There was no house on the quarter section when I entered upon it.

(Objected to as before.)

(Mr. Blair withdraws the question.)

I am not interested in Mr. Whitney's case, but am interested in my own case.

3d x-int. Do you consider yourself interested in the question involved in this case?

(Objected to by Mr. Walker as irrelevant.)

144 Answer. In my case I am interested, but not in Mr. Whitney's individual case.

4th x-int. Do you understand that your case depends upon the decision of Mr. Whitney's case?

Answer. I don't know whether it does or not.

5th x-int. Question repeated.

(Objected to by Mr. Walker.)

Answer. I am not satisfied whether it does or not; for that reason I don't know; that is as near as I can come to it.

6th x-int. Don't you believe that if Mr. Whitney wins or gains his case, that it will help you to gain yours?

(Objected to by Mr. Walker.)

Answer. I believe it may help my case. I dont't whether it will gain mine if he gains his. I saw Mr. Whitney's teams at work ploughing the land in 1862–3. Mr. Whitney called them his teams, and I have every reason to believe they were his, because he stabled
145 them and fed them, and I have no reason to doubt his word that they were his teams. I have seen them in Mr. Whitney's stables. I cannot tell how often. I cannot say how often I saw them ploughing. I saw them ploughing, and saw the land after it was ploughed. The land that was ploughed was enclosed by fences; there were fences on two sides of the ploughed land; on the other two sides there were none. I believe those fences were there before Whitney entered.

I was not present at the time Mrs. Whitney was driven off by violence.

The hay that I speak of was cut on the quarter section.

7th x-int. Was the hay cut within the enclosures spoken of above?

Answer. It was not.

8th x-int. Was the land on which it was cut adjoining the ploughed land?

Answer. It was.

9th x-int. Did the fence run between it and the ploughed land?

146 Answer. There was a fence between it and the ploughed land.

I cannot be positive what part of the quarter section he cultivated the second year; I merely stated that I believed that he cultivated some grain the second year, but I know positively that he had a vegetable garden that year. I cannot say how much land that vegetable garden contained.

10th x-int. Was there as much as half an acre?

Answer. I do not know the quantity, but there was enough for the use of one family.

The vegetable garden was on the other side of the fence from the ploughed land. The house was on the west side of the fence, and on the same side as the garden.

11th x-int. Did not Wh tney, when he entered on this quarter section, go within the enclosures of Frisbie's tenants, above spoken of?

Answer. I suppose it would be considered so.

147 *Re-examination.*

By Mr. Walker:

The fences run at right angles through the quarter section, and two different ways. They were built so as to enclose a large tract

on each side for the use of renters. I was not there when Mr. Whitney entered, but I was informed that they were down when he entered.

(Mr. Blair objects to his saying he was informed.)

The public road ran through one corner of the quarter section, and there was a road running by one end of the ploughed land. It ran through the enclosure.

Interrogatory. Who tore down the buildings on your claim?

Answer. The mob was headed by Mr. Fagan and Mr. Middleton. They were Vallejo claimants, who lived in that neighborhood.

2d int. When did you file your declaratory statement?

Answer. A few days after I made my settlement.

148 *Cross-examination resumed.*

I cannot tell the size of the rooms in Mr. Whitney's house. My business was that of a laborer on farms. I know the price of lumber and labor in California, and from that knowledge I estimated the value of the improvements. I merely stated from the best of my knowledge and belief.

12th x-int. How are you able to make any estimate of the cost of the improvements without being able to state the dimensions of the buildings or the quantity of lumber contained in them?

Answer. I have made an allowance of three hundred dollars, saying from $700 to $1,000, and I think I ought to be able, from the looks of a building, to come within $300 of it.

13th x-int. Whether in point of fact you ever made any estimate, and whether your statement above is not predicted upon the statement of others to you, is what I want to know.

149 Answer. I made the estimate myself, not others.

14th x-int. Did you never hear others talk about it?

Answer. I have heard it spoken of, of course.

Re-examination.

By Mr. Stanton:

Mr. Frisbie never lived on this quarter section to my knowledge; his residence has been in the city of Vallejo ever since I have been on the Soscol ranche.

ROBERT WAUGH.

Sworn to and subscribed before me this 17th day of January, 1867.

EDM. F. BROWN,
Examiner in Chancery.

At 3 p. m. adjourned until to-morrow at 10 a. m.

EDM. F. BROWN,
Examiner.

150 *Deposition of Jno. E. Gokey.*

FRIDAY, 18th *January*, 1867.

Met pursuant to adjournment.

John E. Gokey, being duly sworn, doth depose and say as follows, in answer to interrogatories by Hon. F. P. Stanton, counsel for complainant:

I am 29 years of age, and reside in Solano county, California, and have resided there over five years. I know the land of Mr. Whitney, now in controversy. It is the southwest quarter of section 30 in township 4 north of range 3 west. Mr. Whitney settled on said land in the fall of 1862. He put up a house and barn and corrall, a chicken house, a pig house, and dug a well. The house contains three rooms, 2 of them about 12 by 16 feet, and the other about 10 by 12, and a piazza on one side of the house. The house had a double roof, shingled The barn I should judge was about 40
151 feet one way and about 50 feet the other way, roofed and boarded up on the sides. In this estimate of size the shed on the side is included. I should judge those improvements were worth from $800 to $1,000. Lumber sold at that time at from $20 to $25 and $30 per 1,000 in gold coin. Flooring was worth more than the other lumber. I have been at Mr. Whitney's house frequently. There is a cellar under the house. Mr. Whitney and his family have lived there from the time of his settlement until I left there, on 28th September last, and on that day I saw Mrs. Whitney on the premises. Mr. Whitney cultivated about 30 acres the first year he was there; and in the second year he cut considerable hay, and the winter following, 1863–4, he ploughed and cultivated about 80 acres. In 1864–5 I do not recollect his cultivating any more than a garden; the land was covered by Mr. Frisbie's renters. I was not present to see it, but I understood that Mr. Whitney's teams were driven off the ground by the renters.

152 (This last answer objected to by Mr. Blair.)

Mr. Whitney was not at home at that time, having left for Washington in the fall of 1864. When Mr. Whitney went on the place he had some 10 or 12 head of horses and mules. I have seen him working three teams at once on his place in ploughing and other work. Mr. Frisbie never lived on this quarter question since I have been in California; his residence is in the town of Vallejo, about 5 miles from Mr. Whitney's residence. Mr. Whitney had at least one cow, and some pigs and chickens. I saw the U. S. surveyor surveying that township some time in 1862. I do not remember the date. The pre-emption settlers paid the money to the surveyors. I was one of them, and paid my proportion.

Cross-examination

By Hon. M. Blair, counsel for defendant:

153 The improvements were put up in 1862; a portion of them. The house and barn were put up in 1862. I could not say that the cellar was dug in 1862, nor the piazza, but I know that it was up in the spring of 1863. I believe all the rooms in the house were in 1862.

(Mr. Stanton remarked to the witness: Speak according to the best of your recollection.)

The witness then said:

According to the best of my recollection, the well was dug in 1862. The barn for keeping horses and hay was put up in the fall of 1862; I cannot say all of it. I could not say all of the improvements of the barn. I was living at that time in Solano county, at Mr. Welcome Fowler's. That is about 5 miles from this quarter section, to the best of my knowledge. I made it my home there the biggest portion of the time for 5 years. I was employed at dairying. I worked a portion of one winter with Mr. Lemman, at the same time I made my home at Mr. Fowler's; I do not recollect the winter.

154 I have a pre-emption claim on a part of this ranche, the SW. ¼ of section 2, t. 4, r. 3.

Charles Ramsey pretends to claim the Vallejo title to my quarter section. I made my claim in September, 1862. I was dairying in the summer of 1862, and had my cows on shares from Mr. Fowler, and made my home there. At the time I made my claim I was making my home on my quarter section.

X-int. What was the exact date of the month and year of your making your claim?

Answer. It was in September, 1862; I don't recollect the exact date.

2d x-int. Do you swear positively you do not recollect the day of the month?

Answer. I do not recollect exactly the day of the month. If it is not out of place, if you will allow me to look at my papers, I can tell the day of the month. After looking at my papers I say it was September 13th.

155 (Mr. Stanton, on the part of the complainant, objects to all testimony concerning the witnesses' own claim and settlement, as being irrelevant to this case.)

3d x-int. Did you go on this land in the night or in the day?

Answer. In the day.

4th x-int. Where did you sleep the night before the day you went on the land?

Answer. At Mr. Fowler's.

5th x-int. Where did you sleep the night after?

Answer. I slept on the land.

6th x-int. Where did you sleep the night after that?

Answer. On the said quarter section.

7th x-int. How many nights did you sleep on the said quarter section?

Answer. I did not keep a memorandum of the number of nights.

8th x-int. Did you sleep five nights on the said quarter section?

Answer. Yes; more than ten.

9th x-int. Did you sleep on it fifteen nights?

Answer. I did not keep a memorandum of the number of nights.

156 10th x-int. Did you keep a memorandum of the ten nights you slept there?

Answer. No, sir; but I know I was there ten nights.

11th x-int. Do you know without a memorandum that you were there more than 10 nights?

Answer. To the best of my knowledge I was there over ten nights. I was drove off by force by Charley Ramsey, his son, and another young man, and shot, wounded in the shoulder; and he swore an oath telling his son to kill the damned rascal. He swore an oath and repeated it again that if I was caught there again he would take a shot gun and blow the top of my head off. I have got the mark in my shoulder to show now to any one that wants to see it.

12 x int. When did that take place?

Answer. In the fall of 1863. I cannot tell the precise date.

13th x-int. Were the 12 days that you say you staid on the place in the fall of 1862?

157 (Question objected to, because it assumes that the witness says that he lived there twelve days.)

(Question waived.)

14th x-int. How many days and nights after the 13th of September, 1862, when you made your claim, did you remain on the place?

Answer. I did not keep any memorandum of them.

15th x-int. I did not ask you whether you kept a memorandum. I asked you as to the fact whether you remained on the place, and how many days and nights you were there following the 13th of September, 1862.

Answer. To the best of my knowledge I was there somewhere about one week at the time when I put up my house.

16th x-int. Don't you consider yourself interested in the question involved in this suit?

Answer. No, sir.

17th x-int. Don't you believe that if Mr. Whitney wins this suit it will help you to win yours?

158 Answer. I don't know nothing about it. My suit rests upon its own merits, and Mr. Whitney's the same.

18th x-int. I did not ask you whether you know, but I asked you whether you did not believe that if Mr. Whitney wins his suit it will help you to win yours.

Answer. I believe my suit rests on its own merits.

There was no house on my quarter section only the one I put there, and no other improvements ever there that I know of. It was surrounded by a fence that enclosed a large tract of land; there was no

fence on my quarter except where the line ran across the corner of the stone fence; I should judge that there was about 6 or 8 rods of stone fence on my quarter section. I never cultivated a crop on my quarter section. I hired a man and sent him on there with a team,
and Charley Ramsey and his mob ran them off, and the team
159 ran away and one of the horses got killed. I did not see it, but I saw the horse dead.

(Mr. Blair objects to what the witness did not see.)

I saw the dead horse; he was on the adjoining quarter section. That happened in the winter of 1863-4.

There was a sort of a house or shanty on the quarter section of Mr. Whitney before he went there, put up for renters. The land was surrounded by a fence enclosing a large tract of land, and when he went on there was a portion of this fence that was down; I don't know how much. There were two fences running through it, dividing it for renters, crossing each other. I know that the fence was down from my personal knowledge. I had nothing to do with pulling it down.

I had no personal acquaintance with Mr. Whitney till after he went on that land. I had seen him once before, on the road, and only that time to the best of knowledge.

160 I only know that those occupying the shanty were renters, because other persons told me they were, and because I saw different people there different years. I did not know any of them personally, but saw that they were different persons. I could not say that they changed every year.

Re-examination.

By Mr. Stanton:

The house that I put on my quarter section was torn down and hauled away by Charley Ramsey and his mob-men in the winter of 1863-4. I was not present, and did not see it done. Charley Ramsey testified in the land office in San Francisco, in my hearing, that he helped tear it down and take it away.

(Mr. Blair objects to this last answer.)

To the best of my judgment, in the outer fences enclosing Mr. Whitney's quarter, there was at least 1,000 acres of land.

I cannot say how long the man remained in the shanty after
161 Mr. Whitney went on the land; it was but a short time. To the best of my knowledge he did not claim a pre-emption on that land.

Since Mr. Whitney settled on that land, the shanty for renters has been vacant, but how long or how often I cannot say.

I left California on the 29th of September last, on a visit to my parents and friends in Canada.

I came from Canada here at Mr. Whitney's request.

At the time the surveys of the land were made in 1862, I and others were anxious to enter the same as pre-emption settlers. I heard others say that they were ready.

Mr. Blair objects to this as irrelevant.)

7th x-int. How many nights did you sleep on the said quarter section?

Answer. I did not keep a memorandum of the number of nights.

8th x-int. Did you sleep five nights on the said quarter section?

Answer. Yes; more than ten.

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fence on my quarter except where the line ran across the corner of the stone fence; I should judge that there was about 6 or 8 rods of stone fence on my quarter section. I never cultivated a crop on my quarter section. I hired a man and sent him on there with a team, and Charley Ramsey and his mob ran them off, and the team
159 ran away and one of the horses got killed. I did not see it, but I saw the horse dead.

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I had no personal acquaintance with Mr. Whitney till after he went on that land. I had seen him once before, on the road, and only that time to the best of knowledge.
160 I only know that those occupying the shanty were renters, because other persons told me they were, and because I saw different people there different years. I did not know any of them personally, but saw that they were different persons. I could not say that they changed every year.

Re-examination.

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(Mr. Blair objects to this last answer.)

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I left California on the 29th of September last, on a visit to my parents and friends in Canada.

I came from Canada here at Mr. Whitney's request.

At the time the surveys of the land were made in 1862, I and others were anxious to enter the same as pre-emption settlers. I heard others say that they were ready.

Mr. Blair objects to this as irrelevant.)

I have seen down in Green Valley, on this ranche, pre-emption settlers' houses torn down and drawn away by those that were called landholders, those who claimed under the Vallejo title. It was in the summer of 1866.

(Mr. Blair objects to this as irrelevant.)

162 In 1862 I saw several that had been torndown, but I did not see it done.

JOHN E. GOKEY.

Sworn and subscribed before me this 18th day of January, 1867.

EDM. F. BROWN, *Examiner*.

Levi H. Whitney's testimony.

Levi H. Whitney, being duly sworn, doth depose and say, in answer to interrogatories by Hon. F. P. Stanton, counsel for the complainant, as follows:

I am the complainant in this cause; I am 49 years of age; and my residence is in California, on the southwest quarter of section 30 in township 4 north of range 3 west, Mount Diablo base and meridian.

I went on that quarter section on the 28th day of October, 1862, entering upon it during the afternoon of that day about three o'clock, with my family, consisting of wife and two children, one man,

163 a carpenter, with my teams, goods and household furniture.

At that time there was a house on this quarter occupied by a renter John B. Frisbie. That renter informed me that he should make no attempt to claim a pre-emption right; he was simply a rentor.

My improvements consisted of a house, and barn, and shed, and corral, a well, and a house for fowls, and a hog yard and shelter. The house consists of three rooms, two of them 12 by 16 feet, and the other about 10 feet square, floor, double roof or pitch roof, and shingled, piazza, cellar under the house, and bulk-head over the cellar stairs, windows, panel doors, and otherwise comfortably finished, and whitewashed with a preparation such as is used in that country.

The barn proper is about 24 feet long, and about the same width, with sheds attached. The chicken house for poultry is 14 by 16 feet, roofed and sided, except one side left open for ventilation. The corral is a five-plank fence with posts, and encloses about a quarter

164 of an acre attached to the barn and shed. The lumber used in the erection of these buildings is good merchantable lumber, and was worth at that time at the lumber yards from $22 to $25 00 per 1,000, without the floor plank, which was worth $30 or more per 1,000. These are gold prices. The shingles were first quality, and I think cost $5 00 per 1,000.

I commenced these improvements the 29th of October, 1862, the day after my settlement, and continued them during that fall, till I erected the house and barn; and the majority of the improvements that are there now were completed prior to January 1st, 1863.

From the quantity of lumber used in their erection, and the price of labor at that time, my judgment is that they would cost $900 to $1,100.

In the winter of 1862–3, commencing some time in December, 1862, I ploughed, I should judge, about 30 acres on this quarter section and planted a vegetable garden. During the summer of 1863, I cut over about 60 to 75 acres of hay ground on this quarter, stacked it, baled it, and sold it, storing it, sufficient to keep
165 my stock through the winter. During the winter of 1863–4. I ploughed about 80 acres on this quarter, sowed it to wheat and barley. During the summer of 1864 harvested the whole of it, and cut considerable hay also on this quarter. During the summer I also had a vegetable garden sufficient for family use.

The winter of 1864–5, in my absence while here at Washington, John B. Frisbie rented the land I have thus occupied to a tenant, who ploughed the ground I had ploughed the previous years. My son, in the winter of 1864–5, went in to plough with two teams, when those renters of Frisbie came upon him when he was at work, drove him and teams by force from the land I had cultivated the previous years.

(Mr. Blair objects to all this last statement as hearsay.)

This township was surveyed in October, 1862, and the pre-emption settlers raised the money and deposited it with the surveyor general to pay the surveys of this ranche.

I filed my declaratory statement, specificially describing this
166 quarter section, under the direction of the register of the district land office at San Francisco, during the month of November, 1862, and after the land was surveyed. I was ready and waiting to enter and pay for this quarter section, at any and all times after filing my declaratory statement. The pre-emption settlers generally were also ready; I know this to be the fact, from having been on committees to wait upon the surveyor general to learn the fact when the plats of these surveys would be ready to be returned to the local land office; and on or about the 9th of January, 1863, at such interview, was informed by the surveyor general or his chief clerk, one or both, that they would be ready to be returned on or about the 20th of January, 1863, to the local land office; there were not less than five pre-emption settlers on that committee.

(Mr. Blair objects to the statements of the surveyor general or his clerks.)

I know that during the winter of 1862–3 John B. Frisbie was in Washington for the purpose of getting a special bill passed
167 for the benefit of the claimants of the Valejo title; so far as I know, it was not known on the ranche that any such bill was pending before Congress in season for them to be represented here; there was no person here at that time in behalf of the pre-emptors.

I have read the reports of the committees of both houses of Congress upon the bill entitled "An act to grant the right of pre-emption to certain purchasers on the Soscol ranche in California," approved March 3d, 1863.

The statements contained in said reports being the same in both houses, in relation to the number of families said to be settled upon said ranche, are not true; and also the statements in relation to the number of small farms, all highly cultivated, dotted all over with comfortable farm houses and other buildings, are not true.

At the time of the passage of that special bill, from the declaratory statement then on file in the local land office, there were from
168 275 to 300 pre-emption settlers. From the best information I have, I should judge that there were not over 150 Valejo claimants, and many of this number did not reside upon the ranche but were living in San Francisco, and some in foreign countries; of those actually living upon the land, from affidavits which I have, were but about 80.

(Mr. Blair objects to the whole of the statement as not being made on the personal knowledge of the witness.)

Adjourned until to-morrow at 10 a. m.

EDM. F. BROWN, *Examiner.*

SATURDAY, 19*th January*, 1867.

Met pursuant to adjournment.

The witness, Mr. Whitney, proceeds:

I wish to state now in relation to the quantity of hay which I put into my barn during the month of November, 1862, that it consisted of about five tons oat hay; I also erected two large stacks of wheat straw on either end of the barn; I had 14 head of horses and
169 mules when I entered upon this quarter section, which I wintered there.

The condition of the fences in October, 1862, was, they were down in many places, leaving the fields open, through which quarter section teams passed and repassed from the American Canon road to the Napa road; also stock ranged over this quarter section ad libitum. I took down no fences, nor removed any, when I entered upon this quarter section. There are two lines of fences running at right angles across a portion of this quarter, which were erected to enclose a large field. The renter, who was on the place when I entered, moved away during the last of November or early part of December, 1862. Then there was no one on the quarter except myself for some months succeeding; several months. Two persons came to me, soon after the first renter left, and said that they had rented the large tract of land enclosed in that large field, but if I was claiming a pre-emption right to that quarter section they would
170 have nothing to do with renting it, as they did not wish to rent any land that was claimed by a pre emption settler; and they left the premises entirely without occupying it.

(Mr. Blair objects to the whole statement so far as it relates to the conversations.)

Some months after this time, a young man by the name of Allen was put upon the quarter, claiming to hold under Frisbie, but I never knew whether he was a renter or not. He staid there several months and then went away. During all this time I cultivated a

large portion of the quarter section, as I have before stated. It vacant several months after Allen left it.

I have the impression that it was nearly a year after Allen before any other person came on to the quarter section claiming under Frisbie, and I know that there was no person on the quarter section, save my family, in August, 1864. I left home the 19th of October, 1864, for Washington, and have been here ever since
171 representing the interest of the settlers. A day or two previous to my leaving home, there was a man by the name of Linn Shouse came on to the quarter section, I suppose as a rentor under Frisbie, and during the winter of 1864–5, he, with other rentors from Frisbie, drove my teams out of the field, as I have been informed. Between August and October, 1864, there was no one but my own family on the premises, until Shouse came on. I was at home at that time.

On the 29th of October, 1862, the day after I entered upon this land, John B. Frisbie, and his brother, Edward Frisbie, and Stephen Klink, a brother-in-law, came on to this quarter section where I was stopping, and asked me what I was there for. I replied that I had entered upon that quarter section of land for the purpose of making a home, and to claim my rights thereto under the general pre-emption law of the United States, it being public land and having been surveyed under the authority of the United States; that I in-
172 tended to stay there until the highest judicial authority of the United States should decide the question of title, if it was ever brought into dispute. John B. Frisbie then seized hold of a double-barreled shot-gun that was standing near him, and stepped back a few paces in a menacing attitude. I told him that I had come there to claim my rights as a pre-emptor, and not to fight. I told him that was my gun, and that he had no use for it. I stepped towards him, put my hand on the gun to put it back to the place he took it from, when he wrenched it from me and stepped a few paces further back and gave it to his brother, Edward Frisbie. John B. Frisbie then raised the cocks of each barrel, but found them not capped. After some other conversation in relation to my settling there, they all left.

John B. Frisbie never lived upon this quarter section, to my knowledge; nor upon any other tract in which this quarter section was included. He has resided in Vallejo ever since I entered upon
173 this quarter section, and was residing there when I entered. Vallejo is about five miles from this tract.

Cross-examination by Hon. M. Blair, counsel for defendant:

I am not aware that I am under indictment for murder; and have no reason at all to believe that I am under any such indictment.

I was arrested here, and it was said to have been upon a blank requisition from the governor of California. I do not know what charge was in said requisition.

On or about the 19th of January, 1864, I was arrested here by one of the detectives or police of this city, taken to the office of the chief of police, and there saw John B. Frisbie, in company with

The statements contained in said reports being the same in both houses, in relation to the number of families said to be settled upon said ranche, are not true; and also the statements in relation to the number of small farms, all highly cultivated, dotted all over with comfortable farm houses and other buildings, are not true.

At the time of the passage of that special bill, from the declaratory statement then on file in the local land office, there were from
168 275 to 300 pre-emption settlers. From the best information I have, I should judge that there were not over 150 Valejo claimants, and many of this number did not reside upon the ranche but were living in San Francisco, and some in foreign countries; of those actually living upon the land, from affidavits which I have, were but about 80.

(Mr. Blair objects to the whole of the statement as not being made on the personal knowledge of the witness.)

Adjourned until to-morrow at 10 a. m.

EDM. F. BROWN, *Examiner.*

SATURDAY, 19*th January*, 1867.

Met pursuant to adjournment.

The witness, Mr. Whitney, proceeds:

I wish to state now in relation to the quantity of hay which I put into my barn during the month of November, 1862, that it consisted of about five tons oat hay; I also erected two large stacks of wheat straw on either end of the barn; I had 14 head of horses and
169 mules when I entered upon this quarter section, which I wintered there.

The condition of the fences in October, 1862, was, they were down in many places, leaving the fields open, through which quarter section teams passed and repassed from the American Canon road to the Napa road; also stock ranged over this quarter section ad libitum. I took down no fences, nor removed any, when I entered upon this quarter section. There are two lines of fences running at right angles across a portion of this quarter, which were erected to enclose a large field. The renter, who was on the place when I entered, moved away during the last of November or early part of December, 1862. Then there was no one on the quarter except myself for some months succeeding; several months. Two persons came to me, soon after the first renter left, and said that they had rented the large tract of land enclosed in that large field, but if I was claiming a pre-emption right to that quarter section they would
170 have nothing to do with renting it, as they did not wish to rent any land that was claimed by a pre emption settler; and they left the premises entirely without occupying it.

(Mr. Blair objects to the whole statement so far as it relates to the conversations.)

Some months after this time, a young man by the name of Allen was put upon the quarter, claiming to hold under Frisbie, but I never knew whether he was a renter or not. He staid there several months and then went away. During all this time I cultivated a

large portion of the quarter section, as I have before stated. It was vacant several months after Allen left it.

I have the impression that it was nearly a year after Allen left before any other person came on to the quarter section claiming under Frisbie, and I know that there was no person on the quarter section, save my family, in August, 1864. I left home the 19th of October, 1864, for Washington, and have been here ever since
171 representing the interest of the settlers. A day or two previous to my leaving home, there was a man by the name of Linn Shouse came on to the quarter section, I suppose as a rentor under Frisbie, and during the winter of 1864–5, he, with other rentors from Frisbie, drove my teams out of the field, as I have been informed. Between August and October, 1864, there was no one but my own family on the premises, until Shouse came on. I was at home at that time.

On the 29th of October, 1862, the day after I entered upon this land, John B. Frisbie, and his brother, Edward Frisbie, and Stephen Klink, a brother-in-law, came on to this quarter section where I was stopping, and asked me what I was there for. I replied that I had entered upon that quarter section of land for the purpose of making a home, and to claim my rights thereto under the general pre-emption law of the United States, it being public land and having been surveyed under the authority of the United States; that I in-
172 tended to stay there until the highest judicial authority of the United States should decide the question of title, if it was ever brought into dispute. John B. Frisbie then seized hold of a double-barreled shot-gun that was standing near him, and stepped back a few paces in a menacing attitude. I told him that I had come there to claim my rights as a pre-emptor, and not to fight. I told him that was my gun, and that he had no use for it. I stepped towards him, put my hand on the gun to put it back to the place he took it from, when he wrenched it from me and stepped a few paces further back and gave it to his brother, Edward Frisbie. John B. Frisbie then raised the cocks of each barrel, but found them not capped. After some other conversation in relation to my settling there, they all left.

John B. Frisbie never lived upon this quarter section, to my knowledge; nor upon any other tract in which this quarter section was included. He has resided in Vallejo ever since I entered upon
173 this quarter section, and was residing there when I entered. Vallejo is about five miles from this tract.

Cross-examination by Hon. M. Blair, counsel for defendant:

I am not aware that I am under indictment for murder; and have no reason at all to believe that I am under any such indictment.

I was arrested here, and it was said to have been upon a blank requisition from the governor of California. I do not know what charge was in said requisition.

On or about the 19th of January, 1864, I was arrested here by one of the detectives or police of this city, taken to the office of the chief of police, and there saw John B. Frisbie, in company with

another man from California by the name of Burns. I was taken by Burns to the Washington county jail that evening. The next
174 day a writ of habeas corpus was sued out. I appeared before Judge David K. Cartter's court. The writ of habeas corpus was granted. Then, at the instance of John B. Frisbie, or other parties in his interest, it appears by the records that he had me re-arrested upon the plea of holding me a prisoner until they could send to California and get another requisition for my apprehension. The case was subsequently carefully and fully examined before Chief Justice Cartter's court, and I was discharged. This occurred about the 28th of January, 1864. I was in jail about 9 days. I remained here in Washington from that time to July 6th, of the same year, attending to the business of the pre-emption settlers of the Soscol ranche, before Congress and the department.

I sailed from New York the 13th of July, 1864, for California, and arrived at San Francisco on or about the 8th day of August following. I saw the deputy sheriff of Solano county; told him that I wished him to arrest me upon any charge of murder or any-
175 thing else that he knew of. He replied, "I don't know what you mean." I then explained that I had been arrested in Washington the previous January on a charge of murder. "Oh," said he, "we have had that affair all over here last winter, and I don't propose to have anything more to do in that matter"—he referring to the trial of sixteen of the Soscol pre-emption settlers, and all discharged. They were tried on the same charge for which I was arrested. He then said to me, "You have your remedy; go into open court and demand a trial." Accordingly, at the first term of the court thereafter, I went into court and demanded trial upon any findings of any grand jury, if there were any then against me. The court refused to grant any trial. Judge Southard, turning to me, said, "You are discharged." I took a copy of the proceedings and brought it to Washington with me.

This was some time in August, 1864. I remained in California, at home, assisting the pre-emption settlers to put in their proof before the local land office from this time down to October
176 19th, 1864, when I left for Washington, at the request of the pre-emption settlers, for whom I have acted from that time to the present.

(The foregoing statement, beginning at the words, "on or about the 19th of January, 1864," on page 30, is objected to by the counsel for the defendant, on the ground that it is not responsive to the interrogatory; that it is a volunteer statement on the part of the witness; and that it states facts of record, if they exist, that is irrelevant.)

(The witness, by his counsel, insists that the statement is a fair and proper explanation of the facts inquired of in the cross-examination.)

My occupation is a farmer. I have been engaged in various kinds of business during my lifetime. From 1849 to 1860 I was engaged in the boot and shoe trade, rubbers and rubber goods, in the

city of Manchester, N. H. In 1860 I crossed the plains to the Rocky mountains, with my family, solely and entirely on ac-
177 count of my health; returned to Leavenworth City, Kansas, during that fall; went into Missouri, purchased 847 head of sheep, took them into Kansas, kept them until the fall of 1861, then sold them; then fitted up my mule and horse train, took in freight at Leavenworth City for merchants in Denver City, made the trip to Denver during December, 1861, and January, 1862, returned to Leavenworth City, run my teams with government freight from Leavenworth City to Fort Scott, Kansas. In the spring of 1862, freighted my teams for Salt Lake City, my family accompanying me, disposed of my freight at Salt Lake City and to Gen'l Conner's regiment. From Salt Lake City went into California during the summer of 1862.

I passed over the Soscol ranche some time in the middle of October, 1862, on my way to San Francisco. The surveys had been made before I crossed the Soscol on my way to San Francisco. I bought a portion of the lumber of which I erected my improvements in Val-
lejo of a firm of which Mr. Houghton was a member. I can-
178 not say how much money I paid that firm. I don't think I kept a memorandum of all of it, and have none with me. In some instances I had bills of the lumber, as I bought it, and in some I did not. I could not say how many purchases I made. In some instances I paid down, and in some instances it was an account for a day or two. The purchase of lumber has been every year since that time, repairing of buildings and fences. I cannot now tell accurately the quantity of lumber, nor the amount paid out for it; but can only estimate it from the size of the buildings and improvements. I cannot say how much I ever paid at any one time. I have no memorandum with me to enable me to do so. I do not know whether I can state or not within one hundred dollars of the amount I paid Houghton & Co. for lumber. The fact of the purchases having been made at different lumber yards, renders me unable to state the amount paid to any one on the aggregate. I cannot now remember the names of the other lumber merchants from whom I pur-
179 chased They were foreign names, and I have not charged my mind with them. I cannot say how many there were. I cannot say whether there were more than two. I cannot name the places nor streets in Vallejo where those lumber yards were kept. I cannot say whether there were as many as two besides Houghton's with whom I dealt. I am positive there was one. I cannot say whether I bought the larger portion of my lumber from Houghton. I cannot swear that I paid as much as $300 for the whole lumber during the fall of 1862. I think I paid more than $200 I did not use lumber that I did not buy. I did not use the lumber that I found on the place. I never attempted to buy out any rentor on the place. The rentor who was on the place when I went there was an Irishman, named Crogan or Grogan, or some similar sounding name. I cannot say what amount I paid for the labor in putting up my house, and other improvements, in the fall of 1862. I, and others, worked

with my carpenter. I planted and sowed in the spring
180 of 1863 my garden and a piece of ground around it. I cannot say to what extent. I sowed some wheat outside the garden, in the winter of 1862–3. I cannot say how much wheat I sowed. I cannot say that I sowed as much as a bushel.

In relation to the larger part of the 30 acres, or thereabouts, which I ploughed in the winter of 1862-3, and before it was really time to sow it, one of John B. Frisbie's brothers-in-law, named Stephen Klink, who was living on a distant tract of land, went on to my ploughed field and sowed it with wheat or barley. Said Klink was not then, nor at any time since, residing upon my quarter section. I did not plant anything outside my garden that winter, and sowed but little wheat, which extended over but a small quantity of land immediately around my garden. Klink sowed over some of the ground that I sowed on.

I don't know that I paid any money directly for surveying;
181 only to the general funds for all purposes, the surveys of this township having been completed before I settled there. I do not know, of my own knowledge, whether any of the fund referred to was paid for the surveying. I had not the position to know, and do not know whether money was paid by the pre-emption claimants for the survey of the Soscol ranche, any farther than the records show.

The declaratory statement which I filed in November or December, 1862, was received by the register of the land office at San Francisco, for which declaratory statement I paid the said register the sum of five dollars. It was on file in said land office in June, 1863.

I have been considerable over the Soscol ranche. I do not know every settlement upon it. I have never counted the settlements upon it. There are small portions of it that I never traversed. I have been much off the main road that traverses it. I have known a large portion of the Vallejo claimants, and some of the rentors. I have no idea how many rentors there are; there is a consider-
182 able number; yet I don't know of my own personal knowledge that they are rentors.

(Objected to by counsel for complainant.)

When I stated on my direct examination that Mr. Frisbie was here in the winter of 1862–3, I did not know it of my own personal knowledge, I then being on the Soscol ranche. When I spoke yesterday about the precise number of pre emption settlers on the ranche, I spoke from the records I had seen, and many of them I knew, personally, that they were pre-emption settlers. I know a large portion of them to be settlers from a personal acquaintance, and having been on their places while they were settled there. I think I have known more than fifty, and been at more than that number of their places while they were settled there; I think I might say a hundred.

1st x int. Give us the names of those you recollect, at whose places you have been whilst they were settled and living on the claims.

183 Answer. Andrew J. Anderson, Elijah True, John R. True, Elkanah Bounds, John Heath, Joseph Smith, Welcome Fowler, Ezra Peacock, —— Peacock, his brother, —— Smith, Jacob Johns, William Ramsey, Charles L. Whitney, John Robinson, William Knight, James Knight, —— Knight, —— Knight, Ezra Scholfield, —— Scholfield, George Dingley, Frank Meister, Millard Meister, Carl Schurz, —— Schurz, Elisha Bonham, —— Pierce, John Fry, Hiram Gist, Samuel Brown, Willam H. Farmer, Charles Wright, Percival Shaffer, Isaac Hobbs, Madison Besse, John Fowler, John J. Fowler, Job Dean, Wm. F. Wood, —— Wood, —— Morris, —— Morris, Andrew R. Sanseman, —— Hunter, —— Wm. E. Preston, F. A. Preston, Wm. Adams, Thos. Potter, John R. Price, Hiram Vaughn, Charles Winegar, Nicholas Marques, William Brown, Fred. Brown, Gustavus V. Churchill, Saml. Fowler, —— Rowland, Cornelius Martin, Jacob Whitney, —— Dugan, —— McGongin, Joseph Hoyt, Mrs. Elizabeth Fee, Mrs. Packwood, and many more, at whose places I have been, and whose names I cannot now speak.

184 I have been at these places at different times, from the fall of 1862 down to the time I last left for Washington, October 19, 1864. These persons that I have named were on their places at the time I called there, but I cannot say whether they were all there when I was last in California. I think a large portion of them, if not all of them, were on those places when I first left for Washington, in June, 1863. There are some of these I have named whose houses have been torn down; some have been ejected by law suits; some have been driven off. This is since I left there, in June, 1863. Some of them ——, and some before. I cannot say how many of them are in possession now, as it has been two years since I was there. I was over the ranche but very little when I was there in 1864, and cannot say how many was then on it. This land varies very much in value. I cannot say what is the value of the quarter section which I claim; but it is about a fair average value of the ranche.

2d x int. You have stated that you were here attending to the interest of the pre-emption settlers on that ranche. What agreements have you with them and with those whom you employ

185 here as to dividing the property, or the proceeds thereof?

(Counsel for complainant advises the witness that he is not compelled to disclose what agreement he has made with the settlers whom he represents, or with counsel employed by him for services rendered, and objects to the question on these grounds; and also on the ground that the question assumes that some agreement has been made with the settlers in relation to dividing the property, when no such fact has been proved.)

Answer. That being a personal matter between the settlers and myself and the counsel, I decline to answer the question.

3d x-int. The same question is put with respect to your own arrangement with counsel in regard to your own claim.

(The same advice is given by counsel.)
Answer. I answer as before.

LEVI H. WHITNEY.

Sworn to and subscribed before me this 19th day of January, 1867.

EDM. F. BROWN,
Examiner in Chancery.

186 I, Edmund F. Brown, examiner in chancery, do hereby certify that the foregoing depositions were taken by me, at my office, at the times therein stated; that the witnesses were respectively by me first duly sworn to testify the truth, the whole truth, and nothing but the truth; that their answers were written down by me in their presence, read over to them by me, and signed by them in my presence, and in the presence of the counsel for the respective parties to this suit.

I further certify that I am not of counsel or attorney for either of parties to this suit, nor in any way interested in the result of the same; and that the respective counsel desire the testimony be closed for the present and returned to the court; and that any further testimony shall he taken upon new notices to be given.

Given under my hand and seal this nineteenth day of January, 1867.

[SEAL.] EDM. F. BROWN,
Examiner in Chancery.

187 *Transcript from General Land Office.—Filed Jan'y* 21, 1867

GENERAL LAND OFFICE, *January* 17, 1867.

I, Joseph S. Wilson, Commissioner of the General Land Office, do hereby certify that the annexed transcripts are true and literal exemplifications of the originals on file in this office.

In testimony whereof I have hereunto subscribed by name and caused the seal of this office to be affixed at the city of Washington, on the day and year above written.

[SEAL.] (Signed) JOS. S. WILSON,
Commissioner of the General Land Office.

[Telegram.]

GENERAL LAND OFFICE, *January* 13, 1863.

Surveyor General Beal, San Franscisco, Cal.:
Stay proceedings; do not act in regard to "Soscol." Answer.
(Signed) J. M. EDMUNDS, *Commissioner.*

188 *Answer.*

SAN FRANCISCO, 13 *Jan'y*, 1863.

Commissioner General Land Office, Washington:
Proceedings in survey of Soscol suspended.
(Signed) E. T. BEALE,
Surveyor General.

[Telegram.]

GENERAL LAND OFFICE,
Washington, D. C., Jan'y 29, 1863.

Register and Receiver, San Francisco, Cal:

Declarations can only be filed after subdivisional work in field and return of plat. See sec. 7, act 30 May, 1862.

No need for apprehenion of claimants.

Full instructions by mail.

(Signed) J. M. EDMUNDS, *Commissioner.*

189 *Book* 1.

Transcript of the field notes of the resurvey of the eastern boundary of T. 4 N, R. 3 W. of the Mount Diablo meridian, as executed by E. H. Dyer, dep. surv., under his instructions of Oct. 1st, 1862.

Survey commenced Oct. 9th, 1862.

" compleated " 13th, 1862.

Preliminary oaths.

I, O. B. Simpson, having been appointed compassman, do solemnly swear that I will execute the duties confided in me to the best of my skill and ability.

(Signed) O. B. SIMPSON.

Sworn and subscribed to before me, this 14th day of Octo., 1862.

(Signed) E. H. DYER,
U. S. Dept Sur.

We, J. P. Royal and John Hunter, do solemnly swear that we will faithfully execute the duties of chain carriers; that we will level the chain upon uneven ground and plumb the tally pins, whether
190 by stocking or dropping the same; that we will report the true distance to all notable objects, and the true length of all lines that we may assist in measuring to the best of our skill and ability.

(Signed) J. P. ROYAL.
J. HUNTER.

Sworn and subscribed to be before me this 14th day Oct., 1862.

(Signed) E. H. DYER,
Dept. Surveyor.

I, A. R. Sauseman, do solemnly swear that I will well and truly perform the duties of axeman according to the instructions given me, and to the best of my skill and ability.

(Signed) A. R. SAUSEMAN.

Sworn and subscribed to before me this 14th day of Oct., 1862.

(Signed) E. H. DYER,
Dept. Surveyor.

191 Field notes of the resurvey of the exterior boundaries of township 4 N. range 3 W. of the Mount Diablo meridian, in the State of California, by E. H. Dyer, deputy surveyor, under his contract so bearing date the 1st day of October, 1862. Survey commenced October 9th, 1862. East boundary of township 4 N. range 3 W., Mount Diablo meridian.

Having contracted to run the subdivision lines of township 4 N. range 3 west of the Mt. Diablo meridian, and from reliable information and personal examination ascertained that there can be no traces found of the mound and post of said township, except at the NW. and SE. corner, in the following manner:

I begin at the SE. corner of the township, at which point I find traces of former mound. Set a post and rebuilt mound, and run north; var. 16° 03′ E.

Chains.

2.80. A ravine 15 links wide runs NE.
10.00. Top of hill; descend.

192 East boundary, T. 4 N. R. 3 W., Mt. Diablo meridian:

17.50. A ravine, bearing NE.
26.66. " " " E.; ascend.
40.00. Set a post for ¼ section corner, with mound pits and trench, as per instructions.
49.00. Top of ridge trends east; descend.
68.00. A brook runs east; ascend ridge.
70.00. Top of ridge trends east.
80.00. Set a post for corner to sections 25, 36, 30 and 31, with mound pits and trench, as per instructions. Land rolling; hills; soil 1st rate.

North between sections 25 and 30; var. 16° 03′ E.:

23.53. A fence at foot of hills, bearing east; enter plains.
40.00. Set a post for ¼ section corner, with mound pits and trench, as per instructions.
40.45. A fence, bearing NE. and SW.
40.50. A brook, " east.
50.50. A fence, " east and west.
54.05. A circular corral.
56.00. Opposite side of corral.
74.50. A brook, bearing east.

193 80.00. Set a post for corner to sections 24, 25, 19, and 30, with mound pits and trench, as per instructions. Land mostly level; soil 1st rate.

East boundary, T. 4 N., R. 3 W., Mt. Diablo meridian north, between sections 19 and 24; var. 16° 03′ E.:

13. A fence, bearing east and west.
24.50. A brook, bearing east.
37.53. A fence, bearing east and west.

40.00. Set a post for ¼ section corner, with mound pit and trench, as per instructions.
77.53. A fence, bearing SE.
78.50. Road from Benicia to Suisun, bearing NW.
80.00. Set a post for corner to sections 13, 24, 18 and 19, with mound pits and trench, as per instructions. Land level; soil 1st rate.

194 East boundary, T. 4 N., R. 3 W., Mt. Diablo meridian north, between sections 13 and 18; var. 16° 03′ E.:

24.10. A brook, bearing east.
40.00. Set a post for ¼ section corner, with mound pits and trench, as per instructions.
80.00. Set a post for corner to sections 12, 13, 7 and 18, with mound pits and trench, as per instructions. Land level; soil 1st rate.

North between sections 7 and 12; var. 16° 03′ E.:

13.60. A slough, bearing NE.
24.70. A fence, bearing east and west.
40.00. Set a post for ¼ section corner, with mound pits and trench, as per instructions.
52.10. A fence, bearing east and west.
52.50. Middle of road from Benicia to Suisan, bearing east and west.
53.00. A fence, bearing east and west.
66.00. Road, bearing SE.
80.00. Set a post for corner to sections 1, 12, 6 and 7, with mound pits and trench, as per instructions; from which an oak, 14 in. dia. bears N. 64° E., dist. 35 links; an oak, 5 in. diam., bears N. 31¾° E., dist. 42 links. Land level; soil 1st rate.

195 East boundary, T. 4 N., R. 3 W., Mt. Diablo, meridian north, between sections 1 and 6; var. 16° 03′ E.:

13.30. A brook, running east.
40.00. Set a post for ¼ section corner, with mound pits and trench, as per instructions.
43.00. A stone fence on line of Suisun rancho, bearing N. 18° 49′ W.
66.28. A stone fence on line of Suisun rancho, bearing S. 26½° W., dist. 11.07 chs. from station No. 1.
70.00. Leave plain and ascend hill covered with oaks.
80.00. Set a post for corner to township 4 and 5 N., ranges 2 and 3 W., with mound pits and trenches, as per instructions; from which a white oak, 15 in. dia. bears S. 50¾° W., dist. 1.20 chs.; a white oak, 18 in. dia. bears S. 39° E., dist. 15 links.; a white oak, 11 in. dia. bears N. 84½° W., dist. 47 links; a white oak 16 in. dia. bears N. 21¾° east, dist. 70 links. Land mostly level; soil 1st and 2nd rate.

From corner to township 3 and 4 N., ranges 2 and 3 W., I run west on a random line on the south boundaries, as sections 36, 35, 34, 33, 32, and 31; var. 16° 03′ E.:

196 South boundary, T. 4 N., R. 3 W.; Mt. Diablo meridian. I set temporary half-mile and mile posts at every 40 and 80 chs., and at 6 miles 3.24 chs. to a point 78 links north of mound at corner to township 3 and 4 N., R. 3 and 4 W. Therefore the correction will be 13 links south per mile. Set a new post, repaired mound trench and pits; return to SE. corner of township, and run at a variation of 16° 09′ E.

West and true line along south boundary of section 36:

3.75. A brook, bearing NE.
16.65. Top of ridge trends NE.
19.61. Foot of ridge; ascend.
32.65. Top of ridge trends north.
40.00. Set a post for ¼ section corner, with mound pits and trench, as per instructions.
42.15. A road at foot of ridge bears NE.; ascend hill.
56.70. A fence, bearing north.
58.45. Top of hill bearing north; descend slope.
80.00. Set a post for corner to sections 12, 35 and 36, with mound pits and trench, as per instructions. Land rolling, hills; soil 1st and 2nd rate.

197 West, on a true line between sections 2 and 35; var. 16° 09′ E.:

20.50. A brook, twenty links wide, runs north.
21.30. Road, bearing north and south.
27.50. Top of ridge, trending north, thence crossing points of ridges, trending north.
40.00. Set a post for ¼ section corner, with mound pits and trench, as per instructions.
56.50. A fence, bearing north and south.
57.65. A road " " "
61.80. A brook, bearing SW.; ascend; points of ridges trending SW.
68.00. A fence on top of ridge, trending south, from which point Col. Gift's house bears S. 5¼° W.
78.45. Foot of ridge; enter a small valley, bearing N. 13°.
80.00. Set a post for corner to sections 2, 3, 34 and 35, with mound pits and trench, as per instructions. Col. Gift's house bears S. 33¾° E. Land high, hills; soil 1st and 2nd rate.

198 South boundary, T. 4 N., R. 3 W.. Mt. Diablo meridian west, on a true line between sections 3 and 34; var. 16° 09′ E.:

4.20. Leave valley and ascend hill.
17.11. A fence, bearing north and south.
25.00. Top of hill; thence along slope of hill, gradually ascending.
40.00. Set a post for ¼ section corner, with mound pits and trench, as per instructions.
70.00. Top of hill and descending.

79.68. A fence, bearing NE. and SW.
80.00. Set a post for corner to sections 3, 4, 33 and 34, with mound pits and trench, as per instructions. Land rolling, hills; soil 2nd rate.

West, on a true line between sections 4 and 33; var. 16° 09′ E.:

10.85. A brook, bearing SW.; ascend; rolling hills.
24.10. A brook, bearing south.
37.57. A fence, " "
40.00. Set a post for ¼ section corner, with mound pits and trench, as per instructions.

199 South boundary, T. 4 N., R. 3 W., Mt. Diablo meridian:

44.00. Top of high rocky ridge; trends south; descend.
80.00. Set a post for corner to sections 4, 5, 32 and 33, with mound pits and trench, as per instructions. Land high, hills; soil 2nd and 3rd rate.

West, on a true line between sections 5 and 32; var. 16° 08′ E.:

3.75. Head of a ravine, bearing SW.
21.25. A brook, " SW.
28.84. A stone fence " south.
30.00. A brook, running SW.
40.00. Set a post for ¼ sections corner, with mound pits and trench, as per instructions.
50.85. A fence, bearing north and south.
55.60. A brook, bearing SW.
80.00. Set a post for corner to sections 5, 6, 31 and 32, with mound pit and trench, as per instructions. Land rolling, hills; soil 2nd rate.

200 South boundary, T. 4 N., R. 3 W., Mt. Diablo meridian west, on a true line between sections 6 and 31; var. 16° 09′ E.:

30.10. A fence, bearing NW. and SE.
30.50. A road, " " "
30.81. A fence, " " "
40.00. Set a post for ¼ section corner, with mound pits and trench, as per instructions.
69.50. Leave hills and enter plains.
83.24. The corners to township 3 and 4 N., R. 3 and 4 W. Land mostly rolling, hills; soil 1st rate.

Between ranges 3 and 4 W., township 4 N., Mt. Diablo meridian. From the corner to township 3 and 4 N., range 3, 3 and 4 W., I run north between sections 31 and 36; var. 16° 03′ E.:

14.05. A fence, bearing east and west.
39.68. A " " " "
40.00. Set a post for ¼ section corner, with mound pits and trench, as per instructions.

201 Between ranges 3 and 4 W., T. 4 N., Mt. Diablo meridian:

80.00. Set a post for corner to sections 25, 36, 30 and 31, with mound pits and trench, as per instructions. Land rolling, hills. Soil 1st rate.

North, between sections 25 and 30; var. 16° 03′ E.:

7.00. Leave hills and enter plains.
8.25. A brook runs west.
14.24. A fence bears east and west.
40.00. Set a post for ¼ section corner, with mound pits and trench, as per instructions.
43.48. A fence, bearing east and west.
43.96. Middle of American Canon road, bearing east and west.
44.35. A fence bears east and west.
44.85. A brook runs west.
49.00. " " "
51.50. Same " south.
72.82. " " SE.
73.27. A fence bears east and west.
80.00. Set a post for corner to sections 24, 25, 19 and 30, with mound pits and trench, as per instructions. Land mostly level. Soil 1st rate.

202 Between ranges 3 and 4 W., T. 4 N, R. , Mt. Diablo meridian north, between sections 19 and 24; var. 16° 03′ E.

29. A corral fence bears east and west.
86. Same brook runs SW.
1.50. Same corral fence bears east and west.
2.75. A fence.
28.00. Foot of hills.
34.00. Top of ridge trending west.
34.72. A stone fence bearing east and west.
39.50. Top of ridge.
40.00. Set a post for ¼ section corner, with mound pits and trench, as per instructions.
69.50. A brook runs west.
77.40. A fence, bearing SE.
78.74. " " east and west.
80.00. Set a post for corner to sections 13, 24, 18 and 19, with mound pits and trench, as per instructions. Land mostly level. Soil 1st rate.

North, between section 13 and 18; var. 16° 03′ E..

40.00. Set a post for ¼ section corner, with mound pits and trench, as per instructions. Land mostly level. Soil 1st rate.

203 North, between sections 13 and 18; var. 16° 03′ E.:

57.94. A fence, bearing west.
65.75. A brook runs SW.
66.81. A fence, bearing E. and W.
72.00. Foot of small hill, top of which is covered with "live oaks."
80.00. Set a post for corner to sections 12, 13, 7 and 18, with mound pits and trench, as per instructions. Land rolling. Soil 1st rate.

North, between sections 7 and 12; var. 16° 03′ E.·

5.00. A forked oak 14 in. dia. in line; enter oak grove.
8.00. Top of hill.
9.39. Oak 17 in. dia. on line.
9.58. " 20 " "
17.83. " 30 " "
30.06. " forked 2 ft. above the ground, 2 ft. in diam., on line.
40.00. Set a post for ¼ section corner, with mounds, pits and trench, as per instructions, from which a live oak 2 ft. dia. bears N. 76½° E., (6) six links dist.; a live oak 1 ft. dia. bears S. 55½° E., 17 links dist.
40.50. A live oak 3 ft. diameter on line.

204 Between ranges 3 and 4 W., T. 4 N., Mt. Diablo meridian:

50.00. Leave oak grove.
53.00. A fence, bearing east and west.
60.00. Foot of hills.
69.00. A fence bears east and west on left bank of a brook.
69.71. A brook runs west.
69.92. To right bank.
80.00. Set a post for corner to sections 1, 6, 7, and 12, with mound pits and trench, as per instructions. Land rolling, hills. Soil 1st rate.

North, between sections 1 and 6; var. 16° 03′ E.:

20.75. A fence, bearing east and west.
30.07. " " " "
30.43. Middle of Napa and Sacramento road, leading east and west.
30.92. A fence, bearing east and west.
40.00. Set a post for ¼ section corner with mound pits and trench, as per instructions.
43.77. A brook runs west.
80.00. Set a post for corner to township 4 and 5 N., range 3 and 4 west, with mound pits and trench, as per . Land low, rolling hills. Soil 1st rate.

205 North boundary, T. 4 N., R. 3 west, Mt. Diablo meridian; north boundary, township 4 north, range 3 west; begin at the corner to townships 4 and 5 N., ranges 3 and 4 west, and run east on a random line on the north boundary of sections 6, 5, 4, 3, 2 and 1; var. 16° 03′ E. I set temporary half-mile and mile posts at every 40 and 80 chains, and at 6 miles to a point 34 links north of corner to township 4 and 5 N., ranges 2 and 3 west. Therefore the correction will be 6 links north per mile; from corner to townships 4 and 5 N., ranges 2 and 3 west, I run west on a true line between sections 1 and 36; var. 16° 00′ E.

12.00. Top of rocky ridge trends south, covered with live oaks.
22.15. A stone fence, bearing SE. at foot of ridge, cross points of ridges trending south.
40.00. Set a post for ¼ section corner, with mound pits and trench, as per instructions.
45.25. A road, bearing SE.
62.34. A fence, bearing south, enter Chas. Kensey's fine yard.
66.25. A fence, bearing south, leave yard.
69.40. " " "

206 North boundary, T. 4 N., R. 3 west, Mt. Diablo meridian.

70.50. Green Valley creek, 50 lks. wide, runs south.
73.70. A fence, bearing south.
80.00. Set a post for corner sections 1, 2, 35 and 36, with mound-pits and trench, as per instructions. Land mostly rolling, hills. Soil 1st and 2nd rate.

West on a true line between sections 2 and 35; var. 16° 00′ E.:

1.50. A brook, bearing SE.
24.10. A fence " SW.
30.50. To foot of hills; ascend.
36.70. A stone fence, bearing SE.
40.00. Set a post for ¼ section corner, with mound pits and trench, as per instructions.
52.50. A brook, running NE.
60.00. Top of hill; descend.
63.00. A brook runs SE.; ascend.
68.50. Top of rocky ridge.
73.00. A circular pond about 4 chs. dia., bears N., dist. about 1.50 chs.
80.00. Set a post for corner to sections 2, 3, 34 and 35, with mound pits and trench, as per instructions, from which a live oak 24 in. dia. bears N. 78½° west, dist. 2.27 chs. A live oak 20 in. dia. bears S. 67½° west, dist. 32.22 chs. Land low, hills. Soil 1st and 2nd rate.

207 North boundary, T. 4 N., R. 3 west, Mt. Diablo meridian west, on a true line between sections 3 and 34; var. 16°, 00′ E.:

18.50. A small pond bears south; dist. 1 chain.
24.00. Top of hill.
36.50. A brook runs north.
40.00. Set a post for ¼ section corner, with mound pits and trench, as per instructions.
41.12. A fence, bearing north and south.
53.70. " " " " "
61.50. " " " " "
65.00. J. H. Jones' house bears north, dist. 50 links; ascend high hill covered with oaks.
73.65. A fence, bearing north and south.
80.00. Set a post for corner to sections 3, 4, 33 and 34, with mound pits and trench, as per instructions; land hilly; soil 2nd rate; timber live oak.

West on a true line between sections 4 and 3; var. 16° E.:

25.00. Top of ridge trends south; from this point the summ itof Elk Horn Peak bears north; dist. about 7 chains; descend.
36.00. A stone fence, bearing north and south.

208 North boundary, T. 4 N., R. 3 west, Mt. Diablo meridian west, on a true line between sections 4 and 33; var. 16° E. :

40.00. Set a post for ¼ section corner, with mound pits and trench, as per instructions; thence descend along north side of ridge, trending west.
80.00. Set a post for corner to sections 4, 5, 32 and 33, with mound pits and trench, as per instructions; land high, hills; soil 2nd rate.

West on a true line between sections 5 and 32; var. 16° E.:

20.50. A brook runs SW. at foot of main ridge; ascends point of ridge, trending SW.
26. Top of ridge; descend.
40.00. Set a post for ¼ section corner, with mound pits and trench, as per instructions.
56.00. A brook in deep ravine; runs south.
60.00. Top of hill.
78.00. A brook at foot of hill; runs south.
80.00. Set a post for corner to sections 5, 6, 31 and 32, with mound pits and trench, as per instructions; land hilly; soil 1st rate.

209 North boundary, T. 4 N., E. 3 west, Mt. Diablo meridian west, on a true line between sections 6 and 31; var. 16° E. :

4.50. Skihigh's house bears north, distant about 3 chains; thence crossing points of ridges, trending SW.

19.20. A brook runs SW.
40.00. Set a post for ¼ section corner, with mound pits and trench, as per instructions.
45.07. A fence, north and south.
49.20. A brook runs SW.
80.00. The corner to township 4 and 5 N., ranges 3 and 4 west; land rolling, hills; soil 1st rate.

General description.

OCTOBER 13, 1862.

This township is very hilly, but contains much good farming land, as most of the hills can be cultivated.

It is well watered by numerous springs and brooks.

There is some timber in the ravines, principally live oak.

210 *Final oaths.*

A list of the names of the individuals employed to assist in running, measuring, or marking the lines or corners described in the foregoing field notes of tp. 4 N., R. 3 W., of the Mt. Diablo meridian, showing the respective capacities in which they acted:

J. P. Royal, } chainmen.
John Hunter, }
A. R. Sauseman, axeman.
O. B. Simpson, compassman.

We hereby certify that we assisted E. H. Dyer, dep. sur., in surveying the exterior boundaries of T. 4 N., R. 3 W. of the Mt. Diablo mer., and that said township has been in all respects, to the best of our knowledge and belief, well and faithfully surveyed, and the boundary monuments planted according to the instruction furnished by the Sur. Gen.

J. P. ROYAL,
J. HUNTER,
Chainmen.
A. R. SAUSMAN,
Axeman.
O. B. SIMPSON,
Compassman.

Subscribed and sworn to before me this 13th day of October, 1862.
E. H. DYER, *Dept. Surveyor.*

211 ALAMEDA CO., *ss:*

I, E. H. Dyer, dept. sur., do solemnly swear that in pursuance of a contract with E. F. Beale, surveyor of the public lands of the United States in the State of California, bearing date the 1st day of Oct., 1862, and, in strict conformity to the laws of the United States and the instructions furnished by said Surveyor General, have faith-

fully surveyed the exterior boundaries of T. 4 N., R. 3 W. of Mount Diablo meridian, in the State aforesaid; and do further solemnly swear that the foregoing are the true and original field notes of such survey, and do solemnly swear that the corner boundaries of the foregoing survey have been constructed of not less size and dimensions than are prescribed in the manual of surveying instructions forming part of the contract, and that all metes and bounds have been marked and conditioned as required in the same, and that the survey was executed in proper person by the contracting deputy.

E. H. DYER, *Dept. Surveyor.*

Subscribed and sworn to this 20th day of Dec., 1862, before me.

[SEAL.] BENJ. WILLIAMS,
Notary Public.

212 *Final oaths.*

U. S. SUR. GEN'L'S OFFICE,
San Francisco, Oct. 12, 1863.

The foregoing field notes of the survey of the exterior boundaries of T. 4 N., R. 3 W., Mount (Diablo meridian,) executed by E. H. Dyer, under his contract of the 1st day of Oct., 1862, having been critically examined, the necessary explanation made, the said field notes and the surveys they describe are hereby approved.

E. F. BEALE,
U. S. Sur. Gen'l.

U. S. SUR. GEN'L'S OFFICE,
San Francisco, March 15th, '64.

I certify that the foregoing transcript of the field notes of the exterior boundaries of T. 4 N., R. 3 W., State of California, has been correctly copied from the original notes on file in this office.

E. F. BEALE,
U. S. Sur. Gen'l.

213 *Transcript from General Land Office.—Filed Jan'y* 21, 1867.

GENERAL LAND OFFICE, *January* 19, 1867.

I, Joseph S. Wilson, Commissioner of the General Land Office, do hereby certify that the annexed transcripts are true and literal exemplifications of the originals on file in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of of this office to be affixed, at the city of Washington, on the day and year above written.

[L. S.] JOS. S. WILSON,
Commissioner of the General Land Office.

GENERAL LAND OFFICE, *Feb'y* 2, 1863.

J. B. Frisbie, esq., of California, at Willard's Hotel, Washington city, D. C.:

SIR: In compliance with your request of the 31st ult'o I herewith transmit a copy of my communication of 29th ult. to the register and receiver at San Francisco, Cal., respecting the "Soscol" claim.

Very respectfully, your ob'd't s't,

J. M. EDMUNDS, *Commissioner.*

214 *Extract from plat of township 4 N., R. 3 W., Mount Diablo meridian.*

Surveys designated.	By whom surveyed.	Date of contract.	Amount of surveys.	When surveyed.
Township lines...	E. H. Dyer....	Octr. 7, 1862....	24 miles, 3 chs., 24 lks.	October 13th, 1862.
Exterior boundaries of lot No. 37, part of Suisun Run.	H. A. Higley.	Instructions dated June 11th, 1855.	00 miles, 25 chs., 36 lks.	1855.
Section lines.	E. H. Dyer....	October 1, 1862.	----------	October 25th, 1862.

The above map of township No. 4 north, range No. 3 west, Mount Diablo meridian, is strictly conformable to the field notes of the surveys thereof on file in this office, which have been examined and approved.

Surveyor General's Office, San Francisco, California, March 4, 1863.

E. F. BEALE,
Sur. Gen'l Cal.

Henry Beard, esq., Washington, D. C.

DEPARTMENT OF INTERIOR,
General Land Office, April 13, 1866.

SIR: In reply to your letter of inquiry, under date of the
215 7th inst., relating to the Soscol Rancho cases, I have to say as follows:

1. 69,303 82–100 acres of said rancho had been surveyed in the field under the contracts and instructions given prior to March 3, 1863, and the surveys thereof were paid out of moneys deposited anterior and subsequent to March 3, 1863, under the provisions of the act of Congress approved May 30, 1862.

2. 10,527 26–100 acres were surveyed since the 3rd March, 1863, and the surveys have been paid out of moneys deposited after that date.

3. The townships subdivided in the field since the 3rd March, 1863, are T. 3 N., R. 2 W., embracing 5,363.44 acres, surveyed Nov. 24 and 25, 1863. T. 5 N., R. 2 W., embracing 1,596 91 acres,

surveyed Nov 26, 1863, T. 5 N., R. 4 W., embracing 1,987.65 acres, surveyed December 1, and 2, 1863, and T. 5 N., R. 3 W., embracing 1,579.26 acres, surveyed Nov. 26 to 30, 1863, being an additional survey to that of T. 5 N., R. 3 W., executed by Ephraim Dyer prior to the 3rd March, 1863, from January 21 to 23, 1863, embracing 18,593.56 acres, and paid for out of $594, deposited June 13, 1863, by M. Dingley, to cover the survey made in January same year.

216 4. The additional townships subdivided prior to March 3, 1863, are as follows:

T. 3	N.	R. 3	W.,	embracing	17,987.05	acres,	surveyed	Nov. 13 to 21, 1862.
3	4	"		"	651.29	"	"	" 21 "
4	2	"		"	2,148.92	"	"	" 3 "
4	3	"		"	23,152.20	"	"	Oct. 14 to 25 "
4	4	"		"	6,768.80	"	"	Nov. 5 and 6 "

The expense of the examination in the field of these five townships were paid out of money deposited October 9, 1863, and the subdivisional work in the field having been executed by E. H. Dyer, dept. surveyor, in 1862, was paid out of the moneys deposited by the following persons:

December 18, 1862,	W. Aspinwall	$825
" " "	J. B. Rumsey	50
" " "	W. H. Patterson	720

In conclusion I have to observe that these last five townships surveyed in 1862 having been examined by T. J. Dewoody, under his contract of Nov. 23, 1863, and found to have been properly executed in the field, he adopted the same as the record under the act of Congress of March 3, 1863, Dewoody indicating, on the plats, improvements of the settlers as an eye sketch.

Respectfully, &c.,

J. M. EDMUNDS, *Commissioner.*

217 *Session of the general term.*

JAN'Y 21, 1867.

Proceedings before the Supreme Court of the District of Columbia sitting in general term, commencing on the third Monday of January, 1867. Present: Presiding, Chief Justice D. K. Cartter, and Justices Olin, Fisher and Wylie.

Decree in gen'l term.

WHITNEY
v.
FRISBIE. } No. 734. Equity, Doc. 8.

FEB'Y 16, 1867.

This cause coming on to be heard, on the motion of defendant, to dissolve the injunction heretofore granted by Mr. Justice Wylie, and the same having been argued by counsel and fully considered by the

court, it is by the court ordered, this 16th day of February, 1867, that so much of the said injunction as prohibits and forbids the said defendant from applying for and taking out a patent for the land in controversy be, and the same is, hereby dissolved; and as to the residue of said injunction, that the same be and continue in force till otherwise ordered.

By order of the court.

218 *Patent, U. S. to defendant.—Patent filed by defendant, May 7, 1867.*

GENERAL LAND OFFICE, *May* 2, 1867.

I, Joseph S. Wilson, Commissioner of the General Land Office, do hereby certify that the annexed is a true and literal exemplification from the patent records of this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington on the day and year above written.

[SEAL.] JOS. S. WILSON,
Commissioner of the General Land Office.

General Land Office, No. 41. Certificate No. 1018.

The United States of America to all to whom these presents shall come, greeting:

Whereas there has been deposited in the General Land Office of the United States a certificate of the register of the land office of San Francisco, whereby it appears that full payment has been made
219 by John B. Frisbie, of Solano county, California, pursuant to [to] the provisions of the act of Congress approved March 3, 1863, entitled "an act to grant the right of pre-emption to certain purchasers on the Soscol rancho, in the State of California," for the following described tract of land, entered as case No. 98 in the report of the register and receiver, dated 2d day of January, 1865, viz: The southwest quarter of section thirty, the west half of the southeast quarter of said section thirty, the west half of the northwest quarter of section thirty-one, and the northeast quarter of the northwest quarter of said section thirty-one; all in township four, north of range three west, Mount Diablo meridian, containing three hundred and eighty-nine acres and eighty-six hundredths of an acre, in the district of lands subject to sale at San Francisco, California, according to the official plat of the survey of the said lands returned to the General Land Office by the Surveyor General. Now know ye, that the United States of America, in consideration of the premises, and in conformity with the act of Congress aforesaid, have given and granted, and by these presents do give and grant unto the said John B. Frisbie, and to his heirs, the said tract above described,
220 to have and to hold the same, together with all the rights, privileges, immunities and appurtenances of whatsoever na-

ture thereunto belonging, unto the said John B. Frisbie, and to his heirs and assigns forever.

In testimony whereof I, Andrew Johnson, President of the United States of America, have caused the letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the city of Washington, the ninth day of April, in the year of our Lord one thousand eight hundred and sixty-seven, and of the independence of the United States the ninety-first.

By the President—

[L. S.] ANDREW JOHNSON.

By E. D. NEIL, *Sec'y.*

Recorded vol. 1, p. 41; Martin Buell, act 9, recorded of the General Land Office, ad interim.

Order.—Setting cause for hearing.—Cause for hearing.

MAY 7, 1867.

Upon the motion of R. J. Walker & Son, made this 6th April, 1867, in the words following:

221 "The clerk will please set this cause for hearing and place it on the May calender;" it is this 7th day of May, 1867, by the clerk, ordered that this cause be and hereby is set down for hearing, and placed upon the calender for May, 1867.

Order.—Cause to be heard in general term.—Cause for hearing at gen. term, filed June 7, 1867.

Ordered, That this case be sent up for hearing to this general term of the court, and that any motion to dismiss the bill which could be made now may be presented then, on the hearing of the case.

June 6, 1867.

A. B. OLIN, *Justice, &c.*

Motion, together with affidavits, to be filed by either party in reference thereto.

A. B. OLIN.

Deed of trust.—J. B. Frisbie to Wm. H. L. Barnes.—Deed filed June 7, 1867.

This indenture made this seventeenth day of October, A. D. 1864, by and between John B. Frisbie, of Vallejo, Solano county, and State of California, of the first, and William H. L. Barnes, of the city and county of San Francisco, State aforesaid, of the second

222 part, witnesseth: Whereas on or about the the twenty-fourth day of February, A. D. 1852, Mariana Guadalupe Vallejo, by his deed bearing date that day and duly recorded, by way of gift and in consideration of natural affection, conveyed and confirmed unto his

daughter, Fanny Guadalupe Frisbie, wife of the said party of the first part, as her separate estate and free from the control of her said husband, a certain tract of land containing five hundred acres, situated in Solano, now Napa, county, in the State of California: And whereas the said Fanny Guadalupe Frisbie and the said John B. Frisbie, did thereafter sell and convey to Fagan and others, by deed bearing date December 1st, A. D. 1855, and duly recorded, one hundred and seventy-six acres of said first named tract of five hundred acres, and did also sell and convey to Benjamin Shause, by deed bearing date October 27th, A. D. 1856 and duly recorded, the balance or residue of said tract of five hundred acres, to wit, three hundred and twenty-four acres;

And whereas the said John B. Frisbie received and appropriated to his own use and behoof, the proceeds of said sale of said separate
223 property of her, the said Fanny Guadalupe Frisbie, and in lieu thereof did set off and appropriate to her, and she agreed and promised to receive then and there the certain other tract of five hundred acres, more or less, hereinafter particularly described, in the place and stead of, and as the equivalent for, the said first-named tract, so conveyed to her as aforesaid by the said Mariana Guadalupe Vallejo.

Now, therefore, this indenture witnesseth: That the said party of the first part, in consideration of the premises and of the sum of one dollar, lawful money of the United States, to him in hand paid by the said party of the second part, at or before the ensealing and delivery hereof, the receipt whereof is hereby acknowledged, hath bargained, sold, transferred, assigned, conveyed, aliened, remised, released and set over, and does by these presents grant, bargain, sell, transfer, assign, convey, alien, remise, release and set over unto the party of the second part, his heirs, executors, administrators and assigns forever, all that certain piece or parcel of land situate, lying and being in the counties of Napa and Solano, State of Cali-
224 fornia, and bounded and described as follows; that is say, commencing at a point on the eastern side of the telegraph road leading from Vallejo to Napa, where the same is intersected by the northern boundary of the land owned and occupied by Mosely and Rutan, and running thence along the eastern side of said road north 8° 03′ west, 32 and 12-100ths chains to the southwest corner of the land of Benas; thence along the southern boundary of the land of Benas and the northern side of the road leading from Vallejo to Fairfield and Suisun to the western boundary of the land of Cicero (or Cicero and George) Rounds; thence southward to the southwest corner of the land of said Rounds; thence along the southern boundary of the land of said Rounds north 84° 41′, east 46 and 57-100ths chains; thence south 13° 23′, west 30 and 20-100ths chains; thence south 13° 36′, east 13 and 13-100ths chains; thence south 9° 42′, east 7 and 42-100ths chains; thence south 60° 05′ west 38 and 89-100ths chains, to the most westerly corner of the lands of Joseph and John Wilson; thence south 5° 50′, east 1 and 16-100ths
225 chains; thence west 49 and 20-100ths chains to the eastern

boundary of the land of Mosely and Rutan before mentioned; thence along said eastern boundary north 40 and 50-100ths chains to the northeast corner of their land, and thence west 8 and 84-100ths chains to the place of beginning, and containing five hundred and sixty-seven (567) acres of land, the above bearings having sole reference to the true meridian; together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof; and also all the estate, right, title and interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first, of, in, or to the above-described premises, and every part and parcel thereof, with the appurtenances; in trust, nevertheless, and to and for the uses and purposes following; that is to say, to make, execute and deliver to the said Fanny Guadalupe Frisbie, her execu-
226 tors, administrators and assigns a good, valid and sufficient deed of conveyance, assignment and transfer, in fee simple, of all and singular the land and premises hereby granted, asigned, transferred, or conveyed, as aforesaid, to the said party of the second part, in such good and sufficient form as shall operate to convey, assign, transfer and vest in said Fanny Guadalupe Frisbie, her heirs and assigns forever, the said land and premises, and every part thereof, and the rents, issues and profits thereof, as her sole and separate estate, and to her and their sole and separate use and behoof forever, independent of her present or any future husband, and not liable or subject to his debts, control, or interference, and for no other purpose whatever.

In witness whereof the said party of the first part, and the said party of the second part, (for the purpose of signifying his acceptance of the trust herein and hereby created,) have hereunto set their respective hands and seals the day and year first above written.

[L. S.] (Signed) JOHN B. FRISBIE.
[L. S.] WM. H. L. BARNES.

Sealed and delivered in presence of—

WM. C. PARKER.

227 *Certificate of acknowledgement on deed.*

STATE OF CALIFORNIA, *City and county of San Francisco, ss:*

On this seventeenth day of October, A. D. one thousand eight hundred and sixty-four, before me, W. C. Parker, a notary public in and for said city and county, personally appeared William H. L. Barnes and John B. Frisbie, to me personally known to be the individuals described in and who executed the annexed instrument, and acknowledged to me that they executed the same freely and voluntarily, and for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year first above written.

[SEAL.] W. C. PARKER, *Notary Public.*

Endorsed: On certificate of acknowledgement, "Recorded in Napa

county records in book 'I' of deeds on pages 76, 77 and 78, Oct. 21st, 1864, at 40 mins. past 8 a. m. J. H. Howland, Recorder. By E. S. Pennell, Dp'ty."

228 Endorsement: of recorder on deed (Napa county.) "Recorded at request of John B. Frisbie, Oct. 21, 1864, at 40 mins. past 8 a. m., in book 'I' of deeds on page 76, 77 and 78. Records of Napa county. J. H. Howland, Recorder. By E. S. Pennell, Dept."

Endorsement: Of recorder (of Solano co.) on deed "Filed for record at the request of J. B. Frisbie, on October 27th, 1864, at 25 mins. part 10 o'clock, a. m., and recorded in book "T" of deeds, pages 367, 368 and 369. Records, Solano county. Geo. H. Riddell, Co. Recorder.

Deed.—Filed June 7, 1867. Deed.—Wm. H. L. Barnes to Fanny G. Frisbie.

This indenture made this seventeenth day of October, in the year 1864, by and between William H. L. Barnes of the city and county of San Francisco, State of California, of the first part, and Fanny Guadalupe Frisbie, wife of John B. Frisbie, of Vallejo, in the county of Solano, State aforesaid, of the second part, witnesseth:

229 Whereas said John B. Frisbie, of Vallejo aforesnid, being the owner in fee of the premises hereinafter described, in consideration of the receipt by him of the proceeds of the sale of certain real estate situate in the county of Solano, now Napa county, conveyed by way of gift, by Mariana Guadalupe Vallejo to the said Fanny Guadalupe Frisbie, his daughter, on the twenty-fourth day of February, A. D. 1854, and in consideration of the sum of one dollar, and of the promise and undertaking of the party of the first part hereto, to convey the land and premises hereinafter described, by good and sufficient conveyance, to the party hereto of the second part, did convey to the party of the first part, the said hereinafter described land and premises with the appurtenances, in trust, nevertheless to convey the same by good and sufficient conveyance to the party hereto of the second part, and as her sole and separate property, as by said deed of conveyance, in trust, as aforesaid, bearing date the seventeenth day of October, in the year 1864, reference being thereunto had may fully appear. Now, the said party of the first part, in pursuance and in the execution of said trust in him reposed by

230 the said John B. Frisbie, and in consideration of the premises and of one dollar, lawful money of the United States, to him in hand paid by the said party of the second part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, hath granted bargained, sold, aliened, remised, released, conveyed and confirmed, by these presents doth grant, bargain, sell, alien, remise, release, convey and confirm unto the said party of the second part, and to her heirs and assigns for-

ever all that certain piece or parcel of land, situate, lying and being in the counties of Solano and Napa, in the State of California, and which is bounded and described as follows, that is to say: Commencing at a point on the eastern side of the telegraph road leading from Vallejo to Napa, where the same is intersected by the northern boundary of the land owned and occupied by Mosely and Rutan, and running thence along the eastern side of said road north 8° 03′ west, 32 and 12–100ths chains to the south-west corner of the land of Benas; thence along the southern boundary of the land of Benas and the northern side of the road leading from Vallejo to Fairfield
231 and Suisun to the western boundary of the land of Cicero, (or Cicero and George) Rounds; thence southward to the south-west corner of the land of said Rounds; thence along the southern boundary of the land of said Rounds, north 84° 41′, east 46, and 57-100ths chains; thence south 13° 23′, west 30 and 20-100ths chains; thence south 13° 36′, east 13 and 13-100ths chains; thence south 9° 42′, east 7 and 42-100ths chains; thence south 60° 05′ west, 38 and 89-100ths chains to the most westerly corner of the lands of Joseph and John Wilson; thence south 5° 50′ east, 1 and 16-100ths chains; thence west 49 and 20-100ths chains to the eastern boundary of the land of Mosely and Rutan before mentioned; thence along said eastern boundary, north 40 and 50-100ths chains to the northeast corner of their land, and thence west 8 and 84-100ths chains to the place of beginning, and containing five hundred and sixty-seven (567) acres of land; the above bearings having sole reference to the true meridian; together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining; and the reversion and reversions, remainder and re-
232 mainders, rents, issues, and profits thereof; and also all the estate, right, title, interest, property, possession, claim, and demand whatsoever, as well in law as in equity of the said party of the first part, of, in, and to the said above described premises, and every part and parcel thereof, with the appurtenances. To have and to hold all and singular the above mentioned and described premises, together with the appurtenances, unto the said party of the second part, her heirs and assigns forever, independently of her present or any future husband, and not liable for or subject to his debts, control, or interference. And it is expressly intended in and by this conveyance, that the rents and profits of the said property shall be applied to the sole and separate use of the said party of the second part; that the same shall be subject to her entire management and disposal; shall be payable to her on her separate receipt, and shall not be liable to the debts, control, or interference of her said husband.

In witness whereof the said party of the first part hath hereunto set his hand and seal the day and year first above written.

233 WM. H. L. BARNES.

Sealed and delivered in the presence of—

W. C. PARKER.

Certificate of notary public of acknowledgment of deed.

STATE OF CALIFORNIA, *City and County of San Francisco. ss*:

On this seventeenth day of October, A. D. one thousand eight hundred and sixty-four, before W. C. Parker, a notary public in and for said city and county, personally appeared William H. L. Barnes, to me personally known to be the individual described in and who executed the annexed instrument, and acknowledged to me that he executed the same freely and voluntarily, and for the uses and purposes therein mentioned.

In testimony whereof I have hereunto set my hand, and affixed my official seal the day and year first above written.

[L. S.] W. C. PARKER, *Notary Public.*

Recorder of deeds.—Endorsement on certificate of notary.

Endorsement on notary's certificate: Recorded in Napa county records in boot "I" of deeds on pages 78, 79 and 80, Oct. 21, 1864, at 42 mins. past 8 a. m. J. H. Howland, recorder. By E. S. Pennell, dep't.

234 Recorder's (of Napa co.,) endorsement on deed: recorded at request of John B. Frisbie, Oct. 21st, 1864, at 42 mins. past 8 a. m. in book "I" of deeds, on pages 78, 79, and 80, records of Napa county.

(No sig'e.)

Recorder's (of Solano Co.,) endorsement on deed. Filed for record at the request of John B. Frisbie on Oct. 27th, 1864, at 25 mins. past 10 a. m., and recorded in book "T" of deeds, pages 362 and 363. Records Solano county. George H. Riddell, co. recorder.

Inventory of the separate property of Fanny Guadalupe Frisbie, wife of John B. Frisbie of the county of Solano, State of California:

Inventory of separate property of Fanny G. Frisbie.—Filed June 7, 1867.

Know all men by the presents:

Whereas John B. Frisbie did, on the seventeenth day of October, A. D. 1864, make, execute, and deliver to William H. L. Barnes of the city and county of San Francisco, State of California, his

235 certain conveyance of certain real estate situate in the counties of Napa and Solano, and which is hereinafter particularly described, in trust nevertheless to convey and transfer the same, and the rents, issues, and profits thereof, to me and my heirs forever, the said property being so conveyed to said Barnes, without any consideration, and being the equivalent of certain land and premises conveyed to me by my father, Mariana Guadalupe Vallejo, February 24, 1852, and subsequently sold and conveyed to various persons by the said John B. Frisbie and myself, the proceeds whereof passed into the possession of said John B. Frisbie, and were by him appro-

priated to his own use, and to the purchase of a certain tract of land, of which the piece, a parcel of five hundred acres more or less hereinafter described, was part.

And whereas the said William H. L. Barnes, in pursuance of the trust in him reposed as aforesaid, did in and by his certain indenture bearing date the seventeenth day of October, 1864, grant, bargain, sell, alien, remise, release, convey and confirm unto me the said Fanny Guadalupe Frisbie, wife of said John B. Frisbie, the cer-
236 tain real estate to him conveyed by said John B. Frisbie as aforesaid, and hereinafter particularly described, without any valuable consideration therefor, passing from my said husband or me, to the said William H. L. Barnes, but the same being the equivalent in quantity of the land and premises conveyed to me by way of gift by my said father Mariana Guadalupe Vallejo as aforesaid, and sold by my said husband and myself, for the benefit of my said husband, as in said trust deed bearing date October 17th, 1864, is fully set forth; which real estate is particularly described, as follows: Commencing at a point on the eastern side of the Telegraph road, leading from Vallejo to Napa, where the same is intersected by the northern boundary of the land owned and occupied by Mosely and Rutan, and running thence along the eastern side of said road north 8° 03′ west 32 and 12-100ths chains to the southwest corner of the land of Benas; thence along the southern boundary of the land of Benas and the northern side of the road leading from Vallejo to Fairfield and Suisun, to the western boundary of the land of Cicero (or
237 Cicero and George) Rounds; thence southward to the southeast corner of the land of said Rounds; thence along the southern boundary of the land of said Rounds, north 84° 41′ east 46 and 57-100ths chains; thence south 13° 23′ west 30 and 20-100ths chains; thence south 13° 36′ east 13 and 13-100ths chains; thence south 9° 42′ east 7 and 42-100th chains; thence south 60° 05′ west 38 and 89-100ths chains to the most westerly corner of the lands of Joseph and John Wilson; thence west 49 and 20-100ths chains to the eastern boundary of the land of Mosely and Rutan before mentioned; thence along said eastern boundary north 40 and 5-100ths chains to the northeast corner of their land, and thence west 8 and 84-100ths chains to the place of beginning, and containing five hundred and sixty-seven (567) acres of land, the above bearings having sole reference to the true meridian.

Together with the rents, issues and profits of said premises, which are therein expressly reserved and conveyed to my sole and separate use.

Now therefore I, the said Fanny Guadalupe Frisbie, wife
238 of the said John B. Frisbie, by and with the consent of my said husband signified by his signing and executing these presents, do hereby publish, make known and declare, that the abovementioned and described real estate is my separate property, and that the foregoing is a full and complete inventory thereof.

In witness whereof, I and my said husband have hereunto set our

respective hands and seals this seventeenth day of October, A. D. 1864.

In presence of—

[SEAL.] JOHN FRISBY,
[SEAL.] FANNY G. FRISBY.

"Recorded in Napa county records, in book B of miscellaneous records, on pages 285, 286 and 286, Octo. 21st, A. D. 1864, at 44 mins. past 8, a. m.

J. H. HOWLAND, *Recorder.*
By E. S. PENNELL, *Dep'ty.*"

And endorsed:

"Recorded at request of J. B. Frisbie, Oct. 21, 1864, at 44 minutes past 8 o'clock, a. m., in book B of miscellaneous records, on pages 285, 286 and 287, records of Napa county."

(No signature.)

Same inventory recorded in Solano county, and endorsed as follows:

239 "Filed at request of J. B. Frisbie, Nov. 9, 1864, at 55 minutes past 4 o'clock, p. m., and recorded in book No. 1 of separate property of married women, page 98, 99 and 100, records Solano county.

(Signed) GEO. H. RIDDLE,
Co. Recorder.

In Equity Court, Oct. 1, 1867.

Order stating agreement of counsel, &c.

"Counsel (agree) that a decree be entered for complainant, and appeal therefrom by defendant."

Exceptions of defendant to compl't's testimony taken Jan'y 12, 1867.

OCT. 17, 1867.

The defendant prays leave to except, and does hereby except, to all the testimony taken by complainant on the 12th day of January, 1867, before Edmund F. Brown, commissioner, &c., and filed in this cause, because he is advised and will insist that the substance of the said testimony is wholly inadmissible for any purpose in this cause.

Second. He excepts to so much and such parts of said testimony as relates to the allegation that the complainant settled on the quarter section in said bill named in the year 1862, or at any other time, and made certain improvements thereon, or that any such improvements were made by complainant.

Third. To so much and such parts of said testimony as re-
240 lates to the allegation, as to the fact of the official survey of

said land by the surveyor general of California or the time to show when the same was surveyed.

Fourth. To so much and such parts of said testimony as relates to the payment for said alleged survey.

Fifth. To so much and such parts thereof as relates to the alleged return of said supposed survey or of any plats thereof.

Sixth. As to so much and such parts thereof as is stated on the information of others; and he will insist on the objections taken at the time before the said commissioner.

BLAIR & DICK,
BRADLEY & BRADLEY.
For Def't's.

Objections of complainant to defendant's testimony.

OCT. 30TH, 1867.

Complainant, by his counsel renews his objections to the filing of the two inventories of the separate property of Fanny G. Frisbie, and the deed of John B. Frisbie to Wm. L. H. Barnes, and of said Barnes, upon the following grounds among others:

1st. The want of proper authentication.
2. The expiration of the time to take testimony.
241 3. That such papers cannot be filed by defendant.
4. That said papers are contradictory of defendants answer.

(Signed) R. J. WALKER & SON.

NOV. 30, 1867.

Order.—General term—remanding cause for amendment of bill.—(Order not written.)

Amended bill.

1867, DEC. 4.

By leave of court the complainant files this his amended bill, and represents that on the 9th day of April, 1867, a patent was issued by the President of the U. S. to the defendant, John B. Frisbie, for the land in the original mentioned, whereby the said defendant has acquired the legal title to the same. The complainant charges that the said patent has been unjustly, illegally, and fraudulently obtained, under the circumstances fully stated in the said original and amended bills as heretofore filed in this case; and the complainant, claiming to be entitled in equity to enter the said land, as a pre-emptioner, as stated in his said original bill, now prays that the said defendant may be held and decreed to be a
242 trustee for this complaint, and that he be ordered to convey the said land to him upon payment of the price required by law, to wit, one dollar and a quarter per acre, which this complainant is now ready and willing, and hereby offers to pay.

LEVI H. WHITNEY.

Sworn to, subscribed before me, Dec. 4, 1867.

R. J. MEIGS, *Clerk.*

Affidavit of compl't of service of copy of the amended bill.

1867, DEC. 5.

"Served copy of the within on Joseph H. Bradley on the 4th inst., and on Montgomery Blair, esq., on the 5th inst.

LEVI H. WHITNEY.

Subscribed and sworn to before me Dec. 5, 1868.

J. M. MEIGS, *Cl'k.*

Order, pro confesso as to the am'd bill, and certifying cause to court in general term.

1868, JAN'Y 8TH.

It appearing to the court that the supplemental bill, filed in this cause on the 4th day of December last. was filed by leave
243 of court after notice given in open court to the said defendant, and that a copy thereof was duly served on the counsel of the said defendant on the 5th day of the same month, and the defendant having failed to answer, plead or demur to the same it is therefore, this 8th day of January, 1868, on motion of complainant's counsel, ordered, adjudged and decreed, that said supplemental bill be, and the same is, taken pro confesso.

It is also further ordered that this cause be again certified to the court in general term, to be there argued and decided in the first instance.

By order of the court.

Motion and affidavit (in general term) to strike out decree pro confesso of Jan'y 8th, 1868, and for time to answer.

1868, JAN'Y 21.

The defendant by his solicitors in this cause moves the court to set aside the decree pro confesso entered therein on the 8th of January, 1868, and to give time to said defendant to answer the second amended bill, filed by said complainant on the 4th day of December, 1867.

244 And for cause they show to your honors, that said amended bill was served by leaving a copy thereof with defendant's solicitors as appears by plaintiff's affidavit of service, and at the time of the service aforesaid the defendant was in the State of California where he has been ever since and is now, so far as his solicitors are informed and believe; that immediately after the said service, one of said solicitors prepared the draft of an answer to said amended bill, and forwarded the same by the first mail, that which was sent from New York on the 11th of December, 1867, to said defendant at Vallejo, California, which is the place of residence of the defendant, to be revised and completed by him, with instructions to sign and swear to said answer, and return the same to said solicitors without loss of time; that said solicitor at the same same time,

by letter overland, and by steamer, directed to San Francisco, California, informed said defendant of the sending to him at Vallejo, of the draft of said answer, so that in case the defendant should be in San Francisco, as is often the case, he should be apprized of
245 the facts without delay; that said draft of the answer could not reach Vallejo, according to the ordinary course of the mail, earlier than about the 3d of January, and the first mail thence, by which it would be possible to send said answer would be that which was sent from San Francisco on the eleventh of January, which mail cannot arrive at New York until the early part of the month of February coming.

They further state and show to the court that if said amended bill, or paper purporting to be an amended bill, is such as to require an answer from the defendant, (which they do not admit.) that the facts which they believe will be set out and contained in the answer of the defendant are material to be presented for the consideration of this court and to the issues sought to be raised by the said amended bill; and therefore they further move the court to enlarge the time for filing said answer to the first Tuesday of March next.

BRADLEY & BRADLEY,
Sol's for Def't.
BLAIR & DICK, *Sol's.*

Subscribed and sworn to the 21 of Jan'y, 1868.

F. A. DICK.

Sworn and subscribed to before me this 21st day of January, A. D. 1868.

Test: R. F. MEIGS, *Cl'k.*

Order.—General term.—Setting aside pro confesso, &c.

246 1868, JAN'Y 8TH.

On defendant's motion, supported by the affidavit of his solicitor, Mr. Dick, the chancellor's order of the 8th of January instant, taking the amended bill for confessed, is set aside, with leave to the defendant to file his answer to said amended bill, he undertaking to file his answer on or before the rule day in March next, and the cause remanded to the Equity Court to be proceeded with there according to this order.

Answer to second amended bill.

1868, FEB'Y 27.

The answer of the above-named defendant to the second amended bill sworn to on 4th December, 1867.

This defendant reserving to himself all benefit and advantage of exception or otherwise that can be taken to the many errors, uncertainties and imperfections in the said amended bill contained, for answer thereto, or to so much thereof as this defendant is advised it is

material or necessary for him to make answer to, answering,
247 says that a patent was issued by the President of the United States about the date stated in the amended bill for the land in question. The defendant denies that said patent was unjustly, illegally, or fraudulently obtained, and denies that the plaintiff now is, or ever was, entitled to enter said land as a pre-emptioner, and denies that the plaintiff is entitled to any interest in said land, or any part thereof, or is entitled to any decree against this defendant.

And the defendant, further answering, says that in the original petition or bill filed herein the plaintiff prayed that the defendant might be restrained from proceeding to disturb or eject him, the plaintiff, from the premises in question, which he would be able to do, as was alleged, so soon as he had made entry of said lands and thus acquired the equitable title, and before the issuing the patent therefor, whereby also the legal title would pass, and therefore the defendant, it was prayed, might be also restrained from entering said land; and in the amended bill the plaintiff alleged that
248 the defendant had before then molested and disturbed him, the plaintiff, in the possession of said land, not only by personal acts of trespass, such as taking the crops, but also by legal proceedings in the State Courts of California in relation to said lands, which legal proceedings the defendant in his answer set up as then pending and involving the title to said lands as between the parties to this suit in an action in the State Court of California. And in the answer filed herein to the amended bill the defendant again insisted upon the action pending in the State Court of California as a defence to this action. And the defendant now again and does hereby distinctly allege that there is now pending in the District Court of California for the district embracing and having jurisdiction of said land, an action between the said Frisbie, as plaintiff therein, and the said Levi H. Whitney and others as defendants, involving the title, and as consequent thereon the right to the possession of said land, which action was begun before the institution of this suit, and never has
249 been discontinued, and is still pending, wherein it is competent for the plaintiff or defendant to allege and prove all legal and equitable grounds for title and relief in relation to said land as fully as may be done in this suit. And this defendant further says, that in said suit so pending in California, the issues arising here, if proper, should be made; and the defendant files herewith a full and complete transcript of the record of said prior and now pending action marked exhibit A to this answer, and prays that the same may be taken as a part hereof.

And this defendant submits to this honorable court that all and every of the matters second amended bill mentioned and complained of, are matters which may be tried and determined at law, and with respect to which the complainant is not entitled to any relief from a Court of Equity, and this defendant hopes he shall have the same benefit of this defence as if he had demurred to the said 2d amended bill, and prays hence to be dismissed with costs, &c., in this
250 behalf most wrongfully sustained.

JOHN B. FRISBIE.

STATE OF CALIFORNIA, *County of Solano*:

John B. Frisbie, the above-named defendant being duly sworn, doth depose and say that he has read the foregoing answer to the second amendment bill filed in this cause, and that the same is true of his own knowledge, except as to the matters stated upon information, and as to those matters he believes them to be true.

Subscribed and sworn to before me this 6th day of January, 1868.

S. G. HILBORN,
Notary Public, Solano County, Cal.

In the District Court of the 15th judicial district, city and county of San Francisco, State of California.

Exhibit A to answer to 2nd amended bill..

JOHN B. FRISBIE, plaintiff,
v.
LEVI H. WHITNEY, MRS. WHITNEY, his wife, John Doe Whitney, P. Shaffer and Shaffer, defendants.

Feb'y 27, 1868.

251 The above-named pl'ff brings this action against the above-named defendants, and shows to the court that the christian names of the defendants, Mrs. Whitney, John Doe Whitney, P. Schaffer and Schaffer, are unknown to pl'ff, and which, when ascertained, he prays may be inserted herein.

That heretofore, to wit, on the 4th day of November, 1865, the pl'ff was ever since, has been and still is the owner in fee simple, and was on said day in possession of, ever since has been, and now is lawfully entitled to the possession of all that certain real estate and rancho of land situate in the county of Napa, (State of California,) aforesaid described as follows, to wit: bounded on the north by the public road running from the Vallejo, and Napa road to Suisun and generally known as the American canon road; east by lands in the possession of J. and J. Wilson, and a fence along the westerly line of J. and J. Wilson; south by lands in the possession of said J. and J. Wilson and the lands of Stephen Klink; and on the west by the

252 Vallejo and Napa road and the lands of Mosely and Rutan; that on the 5th day of November, 1865, the defendants wrongfully and unlawfully entered into possession of the said lands, premises and rancho, herein before described, and the tenements, hereditaments and appurtenances thereto belonging, and ousted and ejected plaintiff from the possession thereof, and have since said last-mentioned day wrongfully and unlawfully deprived plaintiff of the rents, issues and profits thereof since said day, and still do deprive plaintiff thereof.

That the defendants are now in wrongful and unlawful possession and occupation of the said premises and of the tenements, heredita-

ments and appurtenances thereto belonging, and wrongfully and unlawfully withhold possession thereof from plaintiff.

That the value of the use, occupation, rents, issues and profits of said premises since the 5th day of June, A. D. 1865, is the sum of $1,000 00.

That plaintiff has sustained damages to the amount $1,000 by reason of the said defendants wrongful and unlawful entry upon,
253 detention and occupation of said premises.

Whereupon the plaintiff prays the following judgment and relief. That the plaintiff be adjudged to be the owner, and entitled to the possession of said lands and premises, and the tenements, hereditaments and appurtenances thereto belonging and appertaining; that the possession and occupation of said lands, premises, &c., by defendants, be adjudged to be and to have been unlawful and wrong.

That the plaintiff be restored to and recover the possession of said premises and lands, and the tenements, hereditaments and appurtenances thereto belonging, and that the plaintiff recover against defendants the sum of $1,000 00-100 damages for the unlawful and wrongful detention and occupation of said premises, with costs of this action.

And for equitable relief in this action the plaintiff further avers, that there is standing and being on said lands and premises dwelling-houses, barns, stables and other buildings, board, rail, post,
254 picket, brush and other fences, which compose and constitute a part of the realty.

That there is standing and growing on said premises of great value, to wit, of the value of $1,000, pear, apple, peach, plum and other fruit trees and other shrubbery.

That there is standing and growing on said premises large quantities of grass and herbage suitable and fit only for the purposes of keeping and grazing sheep and horses and cattle, and for the cutting and curing of hay, and that the portion of said premises upon which the said defendants have made entry as aforesaid are fit and suitable only for said purposes aforesaid. That owing to the present great scarcity of growing grass in the State of California, said grass so growing on said premises is of great and peculiar value, and the loss of the same cannot be computed in damages.

And the plaintiff further avers that the defendants are insolvent, and are utterly irresponsible and pecuniarily unable to respond
255 in damages for their entry upon and detention of said premises. That the plaintiff has been in the use and occupation of that portion of said premises upon which the said defendants have entered until the time of the entry of said defendants; that the defendants have no title or claim of right to said premises whatever, and that they are mere squatters therein; that the defendants are depasturing the said premises, and causing said grass and herbage growing thereon to be consumed and destroyed, and that thereby they do not only deprive the plaintiff of the present growth of said grass and herbage, but they also destroy the seed of said grass and herbage, and prevent the same from re-seeding said lands, as in the ordinary annual process of nature would otherwise be done.

That the plaintiff, being so in the occupancy of said premises, had made arrangements to and was actually occupying said premises, the same being enclosed with a good, substantial fence, for the purpose of cutting and curing hay and depasturing cattle and other
256 domestic animals thereon, and plowing and cultivating the same. That defendants have resisted, and threaten to resist, the depasturing by plaintiff of sheep, cattle and other domestic animals on the said premises, and to prevent plaintiff from cultivating. That they have threatened and do threaten armed violence and interference with the occupation of said premises by plaintiff and his employees and licensees under him.

And the said defendants, for the purpose of more effectually accomplishing the wrongs and injuries herein complained of, have combined and confederated with divers persons, whose names are at present unknown to the complainant, but which, when discovered, he prays leave to add as parties to this his bill of complaint, with proper and apt words to charge them in the premises.

That the defendants have heretofore threatened, and as plaintiff is informed and believes will, in case they are sued for the possession of said lands, premises, tenements, hereditaments and
257 appurtenances, remove, tear down, cut down and destroy the said buildings, fences, trees, shrubbery, grass and hay.

That if suffered and permitted to commit the said several acts of waste so threatened, the value of said lands and premises will be greatly diminished, to wit, to the amount of $1,000.

That the defendants are irresponsible and unable to respond in damages for the value of the said tenements, hereditaments, grass, herbage and hay growing thereon, buildings, fences, &c.

That the defendants have no right, title or interest of in and to said buildings, fences, trees, hay, grass or shrubbery.

Wherefore plaintiff further prays, that during the pendency of this action the defendants and each of them, their confederates, agents, servants and employees, may be restrained and enjoined from committing waste on said premises, and from cutting down, girdling, or destroying the trees, shrubbery and timber thereon grow-
258 ing, and from removing or destroying, or injuring the buildings and fences thereon; from shutting up, corralling, driving off or otherwise interfering with or disturbing any sheep, cattle or other animals which now are, by the leave or license of the plaintiff, on said premises or any part thereof, or which may be so put thereon hereafter; or from in anywise molesting, or threatening to molest, or disturb any herdsman, servants, employees or other person or persons in charge, or to be placed in charge, of any such sheep, cattle or other animals so upon, or to be put upon, said premises by leave of the plaintiff; and from cutting hay thereon, and from removing the same from the said premises, or from the particular place on said premises where any of said hay may be grown, to any other part of said premises, or elsewhere; and also from pasturing cattle, sheep, hogs, horses, mules or other animals on said premises or any part thereof; and from cultivating the same, or interfering with the cultivation

thereof by pl'ff or his employees; and that all persons acting in conjunction with the said defendants in the premises be enjoined and commanded that they desist from in anywise furnishing to the said def'ts any stock, or cattle or other animals for the purpose of
259 having the same fed upon the said grasses or herbage, and from in any way whatever aiding, abetting or enabling the def'ts in the commission of the said wrongs and trespasses on said premises; and also from interfering with or disturbing pl'ff, his agent, servants, and all persons claiming under him, from cultivating said lands and premises or any parts thereof; and also for a perpetual injunction restraining def'ts as aforesaid, and for such other and further relief as may be agreeable to equity.

PATTERSON, WALLACE & STOW,
Attorneys for Plaintiff.

STATE OF CALIFORNIA, *County of Solano, ss:*

John B. Frisbie, the plaintiff, being sworn, says the foregoing complaint is true of his own knowledge, except as to the matters therein stated on the information and belief of plaintiff; and as to those matters he believes it to be true; and that he has heard the said complaint read, and knows the contents thereof.

JOHN B. FRISBIE.

Sworn to before me Nov. 24, 1865.
[SEAL.] CHAS. W. RILEY, *Notary Public, Vallejo, Solano Co., Cal.*

[5-cent stamp, cancelled]

260 Endorsed: Let an injunction issue, as prayed for in the foregoing complaint, upon the plaintiff filing an undertaking as provided by law, in the sum of fifteen hundred dollars, to be approved by me.

Dated San Francisco, Nov. 28, 1865.

SAM'L H. DWINELLE,
District Judge 15th Jud. District.

Filed November 25, 1865.

WM. LOEWEY, *Clerk,*
By G. O. LETCHER, *D. C.*

In the District Court of the 15th judicial district.

JOHN B. FRISBIE, pl'ff,
v.
LEVI H. WHITNEY, MRS. WHITNEY, HIS WIFE, John Doe Whitney, P. Shaffer and Shaffer, defendants.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

Now come the defendants in this case and say that the
261 Christian and full name of John Doe Whitney is Jacob Whitney, and of P. Shaffer is Percival Shaffer, and of Shaffer is Mary Ann Shaffer. And for answer to the complaint herein filed, the defendants say there is a misjoinder of parties defendant herein, in this, that Mrs. Whitney is the wife of Levi H. Whitney, and Mary Ann Shaffer is the wife of Percival Shaffer, def't herein, and that this is not a case in which married women should be joined with their husbands as def'ts.

And for further answer the defendants deny that on the 4th day of November, A. D. 1865, or at any time before or since the plaintiff was the owner in fee simple or in any manner of the premises described in the complaint, and deny that on said day he was in possession of the said premises, and deny that at the said time or at any time since that, he was lawfully entitled to the possession of the same. And defendants deny that on the 5th day of November, 1865, or at any other time, that they or either of them wrongfully or unlawfully entered into the possession of the said premises, or ousted or ejected the plaintiff from the possession of the same, and deny that they have wrongfully or unlawfully deprived the
262 plaintiff of the rents, issues or profits of the said premises; and they deny that they are now or ever have been in the wrongful or unlawful possession of the same premises, or that they wrongfully or unlawfully withhold the possession thereof from the plaintiff. And deny that the plaintiff has sustained any damage by reason of the wrongful or unlawful entry of defendants upon, or detention or occupation by the defendants of the said premises.

For further answer the defendants say, that the premises described in the complaint are a portion of the Soscol rancho and is yet public land of the United States; that the defendants Percival Shaffer and Levi Whitney, in or about the month of November, A. D. 1862, were citizens of the United States, were married men and the heads of families, and in all respects qualified to make settlement upon the public lands of the United States under the provisions of the pre-emption laws of the same; and while so qualified at the last named date, the said Percival Shaffer entered and settled upon the
263 north-west quarter of section thirty-one in township four, north of range three west; and the said Levi H. Whitney entered and settled upon the south-west quarter of section thirty of the same township; that said quarter-sections are a portion of the premises described in the complaint, and the said settlements were made by

the said two defendants under and by virtue of the express license given them by the pre-emption laws of the United States; that the said defendants have and ever since their said settlement continued to reside each upon the quarter-section settled upon by him, and occupy the same ever since as they of right might lawfully do. And defendants deny that they ever entered upon in any way whatever any of the premises described in the complaint except the said two quarter-sections; and as to the said two quarter-sections, they deny that there are any trees or shrubbery of any nature or kind standing or growing thereon, and deny that there are any considerable quantities of grass or herbage standing or growing thereon; but aver that for several years last past the land has been ploughed and sowed to grain, and that there are neither grasses nor herbage growing
264 upon the said lands; they deny that there is a scarcity of growing grass in the State of California at the present time, and deny that there is anything growing upon said land the loss of which cannot be computed in damages; and they deny that they have no claim of right to the premises occupied by them, but aver that they have good right to the possession thereof by virtue of their settlements under and (in) compliance with the provisions of the said pre-emption laws.

And defendants deny that they or either of them have combined or confederated with any persons whatever for the purpose of accomplishing the wrongs complained of in the complaint or for any purposes; and deny that they or either of them have threatened or that they intend to or that they will, whether sued for the said premises or not, either tear down, cut down or destroy any of the buildings, fences, trees, shubbery upon the said premises, or commit waste thereon in any respect whatever; and they deny that they are insolvent, or unable to respond pecuniarily for all damages
265 done, or that will be done by them to the plaintiff; and deny that they have no claim or title to the buildings, &c., upon the said quarter section, but aver that they erected the buildings at their own cost and expense and are the owners thereof.

M. A. WHEATON,
Att'y for Def'ts.

STATE OF CALIFORNIA, *County of Solano, ss*:

Percival Shaffer being duly sworn on his oath, says he has heard the foregoing answer read and knows the contents thereof, and that the same is true of his own knowledge, except as to the things therein stated on information and belief, and as to those things he believes it to be true.

PERCIVAL SHAFFER.

Sworn and subscribed to before me this fifth day of December, A. D. 1865.

[SEAL.] CHAS. W. RILEY,
Notary Public.

[5-ct. rev. stamp, cancelled.]

Endorsed: Filed Dec. 8, 1865. W. Loewy, clerk, per Wm. R. Satterlee, D. C. Service of a copy of the within answer acknowledged this 8th day of November, A. D. 1865. Patterson, W. and Stow, atty's for pl'ff.

266 Fifteenth District Court.—(Register B.)

JOHN B. FRISBIE
v.
LEVI H. WHITNEY. } No. 1417.

Patterson, W. and S. Wheaton.

1865.

Nov. 25. Comp. for injunction filed, sum's signed.
28. Sum's del'd, undtkg. filed and injunction issued.
Dec. 8. Ans. filed (Jan'y 8, 1866,) 6 affid'ts filed by pl'ff.

1866.

Jany. 8. Affid't of Ed. Frisbie filed (8), motion to dissolve injunction argued and sub. on briefs to be filed in 10 days.
March 6. Order, injunction dissolved.

1867.

Dec. 10. Order, placed on eq. calendar.

In the District Court of the 15th judicial district of the State of California, in and for the city and county of San Francisco.

JOHN B. FRISBIE, plaintiff,
v.
LEVI H. WHITNEY *et al.*, defendants. } No. 1417.

267 I, Washington Bartlett, county clerk of the city and county of San Francisco, and ex-officio clerk of the District Court of the 15th judicial district of the State of California, in and for the city and county of San Francisco, do hereby certify the foregoing to be fully true and correct copies of the original complaint and answer on file in my office, and of the entries appearing in the register of actions in the above-entitled cause.

In witness whereof I have hereunto set my hand and affixed the seal of said court this 23rd day of January, A. D. 1868.

[SEAL.] WASHINGTON BARTLETT,
County Clerk.

In the District Court of the 15th judicial district of the State of California, in and for the city and county of San Francisco.

JOHN B. FRISBIE, plaintiff,
vs.
LEVI H. WHITNEY *et al.*, defendants. } No. 1417.

268 I, Samuel H. Dwinelle, sole judge of the District Court of the judicial district of the State of California, in and for the

city and county of San Francisco, do hereby certify that said court is a court of record, having a clerk and seal; that Washington Bartlett, who has signed the annexed attestation, is the duly elected and qualified county clerk of the city and county of San Francisco, and was, at the time of signing said attestation, ex-officio clerk of said District Court; that said signature is his genuine handwriting, and that all his official acts as such clerk are entitled to full faith and credit. I further certify that said attestation is in due form of law.

Witness my hand this 23d day of January, A. D. 1868.

[L. S.] SAML. H. DWINELLE,

Judge of the District Court of the 15th judicial district of the State of California, in and for the city and county of San Francisco.

269 *Exceptions of complainant to defendant's answer to the amended bill.*

1868, MAR. 21.

LEVI H. WHITNEY *vs.* JOHN B. FRISBIE. } In equity. No. 734.

The complainant excepts to the answer of the defendant to the amended bill, filed on the day of March, 1868; and for cause states:

First. Because the said answer is not responsive to the amended bill.

Second. Because said answer contains matter irrelevant to the only issue stated in said amended bill.

Third. Because the case of Whitney vs. Frisbie was tried and decided on the 1st day of October, 1867, before the judge holding the special term of the Equity Court, and by consent a decree entered on the 1st day of October, 1868, in favor of complainant and the case sent to the court in general term, by appeal, where it was fully argued on bills, answers, replication, and testimony, and thereupon the court, on the 30 Nov., 1868, decided, adjudged and decreed that the patent had issued to the defendant by consent of complainant as appeared from the patent filed in the case, and that the court

270 being embarrassed by the fact that the issue of said patent was not pleaded by the plaintiff, the plaintiff would be permitted to amend his pleading by stating the issue of the patent, by said decree thereby confining the complainant to the sole pleading of the issue of the patent and a prayer for relief founded thereon. On the 4th day of December, 1867, in pursuance of said permission the complainant filed his amended bill stating [stating] the issue of the patent and making no new allegation. Now the answer of the defendant to said amended bill contains matter excluded by the decree of the court, in that it states that there is a suit pending in the 15th judicial district of California by which statement of new matter he seeks to defeat the jurisdiction of this court.

4. That the defendant heretofore in his answer has set up proceedings in the courts of the State of California to defeat the jurisdiction of this court, and in [in] pursuance of said pleas generally setting up said facts pleaded specially a suit in the 3rd judicial
271 district of the State of California, but utterly failed to prove said allegations, and it is now too late to bring in any proof of this new matter or allege it in the said answer.

5. That the case having been fully at issue on bill, answer, replication and testimony, and a decree of the special term, given in favor of complainant and the court in general term having given permission only to file an amendment setting forth only the issue of the patent, which decision was given on the 30th day of November, 1867, the defendant files a record which shows a material alteration of the status of the case in California in the 15th judicial district heretofore dismissed, which alteration was made on the 10th day of December, 1867, ten days after the decree of this court, manifestly without notice to complainant and for the purpose of defeating justice by evading the jurisdiction of this court, which proceeding is contrary to the principles of equity and should not be permitted by this court to defeat the just claims of the complainant. And the complainant insists upon these exceptions and moves this court to strike from said answer all that part of it which states the
272 pendency of a suit in the 15th judicial district, and which is not responsive to the only allegation permitted to be made in the amended bill, viz: the issuing of the patent to the defendant.

R. J. WALKER & SON,
Att'ys for Compl't.

Agreement between compl't and defendant.

1868, APRIL 13.

It is hereby agreed that this case be certified to the court in banc, to be heard there in the first instance, at the May term, 1868, upon the exceptions filed by the complainant to the last answer of the defendant, as well as finally upon bills, answers, replications, testimony pleadings, &c., &c., at the same time for final hearing on the merits. It is further agreed that the defendant have leave to file exceptions to the certified copy of the record of the decision of the register and receiver, filed with original bill of complainant, and that the original deeds filed by defendant may be replaced with copies duly certified to be such by the clerk of this court.

April 13, 1868.

DUNCAN S. WALKER,
Of Counsel for Complainant.
F. A. DICK,
Of Counsel for Def't.

273 *Order certifying cause to court, in banc.*

1868, APRIL 13.

This case coming on to be heard this 13th day of April, 1868, it is hereby ordered, adjudged and decreed, by consent of parties, that it be certified to the court in general term, to be heard in the first instance, as well upon the exceptions of the complainant to the defendant's answer, as finally upon the merits of the case on bills, answers, replications, testimony and pleadings.

Exceptions of def't to testimony of April 13, 1868.

1868, APRIL 13.

Notice is hereby given to the plaintiff that on the hearing of this cause, the defendant will object to exhibit marked , filed with the bill of complaint, being copy of the action of the register and receiver on the case of Whitney, for the reason that the document so filed by the complainant is only a part of the proper record, and the same leaves out a material part thereof.

April 13, 1868.

BLAIR & DICK,
Sol's for Def't.

Service of this duly made April 13, 1868.

D. S. WALKER,
Of Counsel for Compl't.

274 *Minutes of the proceedings of the court on the final hearing of the cause, May term,* 1868.—*Filed May* 9, 1868.

By order of the court, adopted as the minutes, on final hearing, May 8, '68.

"The exceptions of defendant to depositions taken before E. F. Brown, commissioner, on 12th January. 1867 and following, were heard and overruled and disallowed.

"Also, exceptions of defendant, filed April 13, 1868, to copy of the record of the decision of the register and receiver, filed with the original bill, were overruled.

"The exceptions of plaintiff, filed March 21, 1868, to answer to second amended bill, were—

"The plaintiff read in evidence the depositions taken before Edm. F. Brown, commissioner, on 12th January, 1867 and following, and filed Jan'ry 21, 1867.

"Also certificate and transcript of General Land Office, certified 17 January, 1867, and filed 21 January, 1867.

"Also exhibit A, filed July 30, 1866, being letter of Secretary Harlan to the Commissioner of the General Land Office, dated July 18, 1866.

275 Also exhibit B, filed July 30, 1866, certified July 25, 1866, by Commissioner Edmunds, being the two exhibits called for in the amended bill.

"Also the patent issued to John B. Frisbie, exhibit to 2d amended bill.

"Also certificate and transcript from the General Land Office, filed Jan'y 21, 1867, certified to 19 January, 1867, by Jos. S. Wilson, comm'r.

"The following exhibits and papers were read in evidence on the hearing of the defendant:

"1st. Opinion of the Attorney General, called for in the answer.

"2d. Exhibit A to answer to the amended bill, filed Jan'y 4, 1867, being the memorial to Congress, being the first six pages of the printed document, the remaining part not read.

"Also exhibit B, in same answer, being report of the register and receiver to the Commissioner of the General Land Office, dated Jan'y 2, 1865; filed Jan'y 4, 1867; certified by Commissioner Wilson 17 December, 1866.

"Also exhibit C, to same answer, filed Jan'y 4, 1867, being the decision of the register and receiver, dated May 5, 1865;
276 certified December 7, 1866, by Commissioner Wilson.

"Also exhibit A, called for in the answer to the second amended bill, being transcript of the suit of Frisbie vs. Whitney and others, in the State Court of California."

Opinion of court, in general term.

1868, MAY 27.

The quarter section of land in controversy is part of a large Mexican grant in California, known as the Soscol rancho.

Frisbie, the defendant, has obtained a patent from the United States for this quarter section, and the object of this suit is to compel him to convey his legal title to the complainant, on the ground that the latter had a prior valid equitable claim under the pre-emption act of 4th September, 1841. In 1844 Micheltorena, Mexican governor of California, assumed to make a grant of about 90,000 acres of land, composing the Soscol ranch, to one Col. Vallejo, for the sum of $5,000 in money.

In 1855 Vallejo a large part of this tract, including
277 the quarter section now in controversy, to his son-in-law, the present defendant.

On the 24th March, 1862, the Vallejo title to all this of land was declared to be void by the Supreme Court of the United States.

On the 2d of June, 1862, Congress passed an act, declaring and making "all lands belonging to the United States, to which the Indian title has been, or shall be extinguished," whether surveyed or not surveyed, subject to settlement and pre-emption under the act of September, 1841.

The title of Vallejo to the Soscol ranch being void, the land belonged to the United States, and although not yet surveyed, was by this act of June 2d, 1862, Ch. 94, opened to actual settlement and pre-emption.

In October, 1862, the complainant entered upon the quarter sec-

tion in controversy in this cause, made an actual settlement and improvement, cultivated the land, has remained in possession to this day, and has complied with all the other terms and conditions required by law to entitle him to a patent for the land.

278 Evidence was taken on this question before the register and receiver of the Land Office in California, who reported it to be sufficient to establish complainant's right, but they decided against him on the ground that, in their opinion, the land was not subject to pre-emption.

This decision, however, was reversed by the Commissioner of the Land Office, who held that the land was subject to actual settlement and pre-emption under the act of 1841.

From this decision of the commissioner, defendant appealed to the Secretary of the Interior, who referred the question to the Attorney General, Mr. Speed, for his opinion on the subject.

The Attorney General thereupon furnished the Secretary with an opinion in accordance with which the latter reversed the decision of the commissioner, and rejected the claims of all the settlers on the Soscol Ranch.

The following extract from that opinion contains the law on the subject as laid down by the Attorney General :

279 "That a settler, under the pre-emption laws, acquires, and can acquire, no vested interest in the land he occupies by virtue simply of settlement; and that no vested interest is obtained until the setler has taken all the legal necessary to perfect an entrance in the Land Office. Before such steps are taken, has nothing but a contingent personal privilege to become without competition the first purchaser of the property which he may never exercise, or which he may waive or abandon. During the interval between the institution of the settlement and the establishment of the claim by proof, and payment of the consideration nominated in the law, Congress has power to dispose of the land at its pleasure. It may recall the privilege previously conferred, or invest any one else with the same privilege, or it may make an absolute grant of the land to other parties, with or without consideration."

The claims of settlers on the public lands, even after having laid out their money, and expended their labor in making improvements and cultivation, no matter to what amount or extent, and

280 under the clear and solemn pledge of the government that they should thereby secure the absolute right of pre-emption, being thus held by the learned Attorney General as of "no account," the Secretary of the Interior refused to recognize the claim of this complaimant, as well as those of all the other settlers on this ranch, and directed patents to be issued to the claimants under the void title of Vallejo, in obedience, as he supposed, to the act of Congress about to be referred to.

At the instance of these Vallejo claimants, Congress passed the act of 3rd March, 1863, which the Attorney General thought gave them a right superior to that of actual settlers and improvers of the land, and it was under this act and this construction of it, that patents

have been issued in this and other cases, in utter disregard of the claims of actual settlers, conceded to be as perfect as it is ever possible for such claims to be.

This act provided first for a survey to be made of the Soscol ranch as a portion of the public lands; second "that, after the plats of survey had been returned to the district land office,' it shall
281 and may be lawful for individuals bona fide purchasers from said Vallejo or his assigns to enter, according to the lines of the public surveys, at $1 25 per acre, the land so purchased, to the extent to which the same had been reduced to possession at the time of said adjudication of said Supreme Court."

Section fourth provides, that all claims within the purview of the act should be presented to the register and receiver within twelve months after the return of the surveys, accompanied by proof of bona fide purchase under Vallejo, of settlement, and the extent to which the lands claimed had been reduced to possession at the time of the adjudication of the Supreme Court, and said register and receiver were to decide upon said claims, under such instructions as should be given them by the Commissioner of the General Land Office, to whom the proof and adjudication were to be returned by the local land office, and no adjudication should be final until confirmed by the commissioner.

The second section of this act limits the privilege of purchase granted the Vallejo claimants to such parts of the ranch as they had reduced to possession at the time of the adjudication of said Supreme Court.

282 The fourth section also required proof to be made of "bona fide purchase under Vallejo settlement, and the extent to which the lands claimed had been reduced to possession at the time of the adjudication of the Supreme Court."

On proof of bona fide purchase under Vallejo, these claimants were entitled to obtain patents on paying $1 25 an acre for their land, to the extent that such lands had been reduced to possession at the time of the adjudication of the Supreme Court, namely, 24th March, 1862, and they were entitled to no more. The fifth section provides that all other portions of the ranch not embraced by these bona fide claims and "settlements" should be dealt with as other public lands.

The act, in every section thereof, treats the Vallejo title as void, and the whole tract as public land belonging to the government, and intends to grant to the Vallejo claimants merely the "bounty" of pre-emption to the extent that each of them had reduced his claim to possession at the date of the decision of the Supreme Court.

But the land in controversy in this case, at the time of the
283 decision of the Supreme Court, referred to, had not been reduced to possession and settlement by this defendant, nor by any one, in the usual sense of those terms when found in other acts of Congress relating to the public lands. It had neither been enclosed, cultivated, nor improved, otherwise than as it adjoined other portions of the ranch which had been so reduced to possession and settlement.

We are of opinion that the fair construction of this act limited the claims of the purchaser under Vallejo to such portions of the Soscol ranch as had been reduced to possession and settlement, in the usual acceptation of those terms, and that no single improvement and settlement should embrace more than one quarter section of the tract in all cases where such claim interfered with existing established rights of pre-emption. We think this is, plainly, the proper construction to be given to the second section of the act, which is in the following words: "That after the return of such approved plats to the district office, it may and shall be lawful for individuals, bona fide purchasers from said Vallejo, or his assigns, to enter,
284 according to the lines of the public surveys, at one dollar and twenty-five cents per acre, the land so purchased to the extent to which the same had been reduced to possession at the time of said adjudication of said Supreme Court, joint entries being admissible by coterminous proprietors to such an extent as will enable them to adjust their respective boundaries."

The entries were to be made according to the lines of the public surveys "to the extent to which the same had been reduced to possession."

The benefit of any one settlement and possession under this act, was to be restricted to the lines of the public surveys. One acre so settled and possessed, would entitle the purchaser to some portion of the land limited by the public surveys. What portion shall that be? It might embrace many thousands of acres, had the grant not been restricted by the condition that it should be confined to such portion as had been actually reduced to possession.

The defendant in this case thinks that the reduction of even a fraction of an acre on one corner of his void claim of thousands of
285 acres entitles him to a pre-emption of the whole, in preference to the bona fide, vested, pre-emption rights obtained by actual settlers prior to the date of the act on which he builds his title, and at a time when the Vallejo claimants had no color of title and not even an actual settlement on the land. If the construction claimed by the defendant be correct, (and it is the one on which the department has acted in issuing his patent in this case,) then it follows that any purchaser under Vallejo, might claim sixty, eighty, or even ninety thousand acres of the land by showing the settlement and possession of a fraction of one acre, or any portion of this vast territory. We think the fair construction of the act in question is that which limits the claims of the Vallejo purchasers to such portions of the ranch as Congress, at the date of the act, had the right to grant consistently with the objections of contract and good faith which were due from it to the settlers.

Since the passage of the act of 4th September, 1841, which introduced a new policy in regard to the public lands, the settler
286 who goes upon a quarter section and makes his settlement and improvement, acquires thereby an incohate equitable title, which is as complete and perfect, to its extent, as title to any property can be.

Formerly, settlers on the public lands were trespassers; but from time to time, acts of Congress were passed allowing them the rights of pre-emption on certain terms. To them, these acts conferred bounty-privilege, because the settlers having entered on the lands in violation of law, had no rights against the government. And when we meet with an opinion of the Supreme Court which speaks of the rights of the settlers to pre-emption, as a bounty or gratuity on the part of the government, we shall always find that the court is referring to cases under the acts in force prior to the passage of the act of 1841.

In the United States vs. Fitzgerald, (15 Peters, 407,) it was held that no reservation or appropriation of the public lands can be made after a citizen has acquired the right of pre-emption.

287 In Lytle vs. The State of Arkansas, (9 Howard, 333,) the court say: "The claim of pre-emption is not that shadowy right which by some it is considered to be. Until sanctioned by law, it has no existence as a substantive right; but when covered by law it becomes a legal right, subject to be defeated only by a failure to perform the conditions annexed to it."

In Delassus vs. The United States, (9 Peters, 133,) Chief Justice Marshall, says that "no principle is better settled in this country than that an inchoate title to lands, is property," and again he says: "The inquiry then is whether this concession was legally made by the proper authorities, and might have been perfected into a complete title." His inference was that the inchoate right which might have been perfected into a complete title, was property."

In Smith vs. The United States, (10 Peters, 330.) Mr. Justice Baldwin in delivering the opinion of the court, says: "It was never doubted by this court that property of every description in Louisiana was protected by the law of nations, the terms of the treaty,

288 and the act of Congress; nor that in the term "property" was comprehended every species of title, inchoate, or perfect, embracing those rights which lie in contract, those which are executory, as well as those which are executed." See also Rice vs. Railroad Company, (1 Black 321.)

The act of 1841 invites settlers to enter upon and make improvements on the public lands, and pledges the faith of the government, that they shall have a patent for their lands, for $1 25 an acre. A settler makes his selection, moves his wife and children perhaps a thousand miles and settles on a quarter section of the public land, builds his cabin and stable, clears away the forest, and at length after years of united toil, hardships and expenses, on his part and that of his family, and the expenditure of hundreds of dollars in actual money, in the reliance on the promise of the government embodied in a solemn act of Congress, that he should have his patent on paying 1.25 an acre for the land, he is told by an Attorney General of the United States, and a Secretary of the Interior, that he has no interest

289 or title to his land; that "Congress has power to dispose of the land at its pleasure. It may recall the privilege previously conferred, or invest any one else with the same privilege, or it may

make an absolute grant to other parties, with or without consideration."

Such views as these are abhorrent not only to our sense of justice but to every principle of law.

We are of opinion, that at the date of complainant's entry on the land in controversy, in October, 1862, it was open to actual settlement and pre-emption. That complainant having made his actual settlement and improvement on the land, and complied with all the terms and conditions required by law to complete his title, or tendered performance thereof, was entitled to have a patent for the land, and obtained such an interest and vested title and property therein as could not be taken from him and transferred to another, against his consent, even by an act of Congress.

That the act of Congress of March 3d, 1863, under which the defendant professes to derive his title, must be construed in pari
290 materia, and in a sense consistent with the preservation of rights already fully vested and beyond the power of Congress to destroy, rather than in a sense not given to the same language in other acts of Congress on the like subjects, or in a sense repugnant to established principles of justice and law. And that so read and interpreted the act itself protects the title of the complainant, and silences the pretences of the defendant.

And that the defendant having wrongfully obtained from the government, a patent for the land in controversy, holds the legal title as a trustee, for the complainant, and must be required to convey it to the owner.

As the subject of this controversy is a question of trust, and therefore personal, and not local, the jurisdiction of this court is undoubted.

Nor are the proceedings between these parties now pending in a court in California any just obstacle to our jurisdiction, as the subject and the objects of that controversy are wholly different from those involved in the present suit.

291 *Final decree, made at general term.—June* 6, 1868.

LEVI H. WHITNEY
vs.
JOHN B. FRISBIE. } General Term, May, 1868.

1868, JUNE 6.

This cause coming on to be heard on the bill, amended bill, supplemental bill, the answers to the same, and the replication of the complainant, on the exceptions to evidence, the agreement of counsel, and the evidence in the cause, and having been fully argued by the counsel of the respective parties, and maturely considered, it is thereupon, this 6th day of June, 1868, ordered, adjudged and decreed that the said John B. Frisbie doth hold, and is vested with the title to the land in controversy in this cause, namely, the southwest quarter section No. thirty in township No. four, north of range No. three, west of Mount Diablo meridian, in the county of Napa, Cali-

fornia, in trust for the said complainant, Levi H. Whitney, and that he shall be, and is hereby required, within sixty days from the date, hereof, to make, acknowledge, and deliver to the said com-
292 plainant his heirs or assigns a deed, conveying all the right, title, interest and estate so held by him, the said Frisbie, in and to the said land, and in case of his failure to make, acknowledge and deliver, a good and valid as aforesaid, within the said period of sixty days from and after this date, the clerk of this court is hereby constituted and appointed a commissioner, to make, acknowledge and deliver a good and valid deed for the purposes, and to the effect aforesaid; and on failure of the said clerk to perform his duty in that respect, on being thereunto requested by the proper party or parties, this decree shall itself operate as a full and complete conveyance of the said tract of land from the said Frisbie to the said Whitney, as is provided by law in such cases.

And that said complainant recover his costs of suit in this cause of the defendant.

And from this decree, defendant's counsel, in open court, prays an appeal, which is allowed.

By order of the court.

D. K. CARTTER, *Ch'f Just.*

293 Sup. Ct., D. C.

Affidavit of complainant as to value of land in controversy.

L. H. WHITNEY
vs.
JOHN B. FRISBIE. } In equity.

1868, JUNE 6.

Levi H. Whitney, the above-named complainant, being sworn, saith, that the value of the quarter section of land in controversy in this case, exceeds twenty thousand dollars, lawful money of the United States. Nine dollars an acre in gold, per annum, has been offered as a rent for a term of years.

L. H. WHITNEY.

Subscribed and sworn to before me this 6th of June, 1868.

R. J. MEIGS, *Clerk.*

294 In the Supreme Court of the District of Columbia, the day of 18 .

LEVI H. WHITNEY
vs.
JOHN B. FRISBIE. } No. 734. In equity.

Know all men by these presents, that we, Andrew D. Mowbray, John Hume are bound unto the above-named Levi H. Whitney, in the sum of six thousand dollars, to be paid to the said Levi H. Whitney, his executors or administrators. To which payment, well and

truly to be made, we bind ourselves, and each of us, jointly and severally, and our, and each of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals, and dated this day of , 18 .

Whereas the above-named John B. Frisbie hath prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered in the above suit by the said Supreme Court of the District of Columbia:

Now, therefore the condition of this obligation is, that if the above-named John B. Frisbie shall prosecute his said appeal to effect, and answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void; otherwise, the same shall be and remain in full force and virtue.

[SEAL.] A. D. MOWBRAY.
[SEAL.] JOHN HUME.

Sealed and delivered in the presence of—

The foregoing bond is hereby approved this 10th day of June. A. D. 1868.

D. K. CARTER, *Ch'f Justice.*

No 298 Dec Term 1868

IN THE

Supreme Court of the ~~Dist. of Col.~~ U S

IN EQUITY.

LEVI H. WHITNEY, PLAINTIFF,

vs.

JOHN B. FRISBIE, DEFENDANT.

M. BLAIR,
F. A. DICK,
Of Counsel for Defendant.

J. L. Pearson, Printer, 511 9th Street.

IN THE

Supreme Court of the District of Col.

LEVI H. WHITNEY, Plaintiff,
vs.
JOHN B. FRISBIE, Defendant.
} IN EQUITY.

The parties are both citizens of California, and each claims the land in question under laws of Congress. The plaintiff claims to have settled on the land, and to have made valuable improvements thereon, prior to the passage of the act of March 3d, 1863, and after the decision of the Supreme Court of the United States in the case of The U. S. vs. Vallejo, in 1 Black, 541, in which case the title to the lands in question was involved; and therefore claims to have acquired vested rights in the land under the general pre-emption laws; and, resting on such rights, filed his bill in equity in this court, alleging that the defendant was about to obtain from the executive officers of the United States a patent for the land, under the special act of March 3d, 1863.

No proof was made in support of plaintiff's rights under the general pre-emption laws before the 3d March, 1863, nor was the land surveyed by the United States until after that time. When the register and receiver took proof as to the defendant's title under the special act, they also, under instructions from the Commissioner of the General Land Office to do so and report, heard evidence as to plaintiff's possession, and reported that plaintiff had entered and made valuable improvements on the quarter section in question, after said decision of the Supreme Court of the United States, and before March 3d, 1863; and they reported that the defendant was also in posses-

sion of the same land, as a purchaser from Vallejo; and they decide, that under the act of March 3, 1863, the plaintiff is not entitled to said land.

No certificate of entry was made by the register and receiver in favor of the plaintiff, and no declaration of settlement and intention to purchase was permitted by the register and receiver—the Commissioner of the General Land Office having, prior to March 3, 1863, directed the register and receiver not to receive any declarations in relation to the Soscol ranch. The plaintiff, claims, however, that, on the facts so reported in his favor, in obedience to the instructions of the commissioner as to the improvements and possession, he is entitled to enter the land, notwithstanding the contrary decision of the register and receiver, and that the special act of March 3, 1863, is inoperative and void, so far as his rights are concerned.

The bill prays for an injunction against the defendant to restrain him, amongst other things, from accepting the patent for the land under said special act, which the Secretary of the Interior had decided he was entitled to. Mr. Justice Wylie granted such injunction.

Indefinite charges of fraud are brought into the case in the amended bill, which, as stated below, were not sustained. The facts are more fully stated further on.

In support of the motion to dissolve the injunction, the following propositions are submitted, in which it is contended—

I. I. That as Congress alone has the power to dispose of the public lands, and make the needful rules and regulations respecting the same, the court has no jurisdiction of the case presented here.

Constitution of the United States, article iv., sec. 3.
Wilcox vs. Jackson, 13 Pet., 498.
Landes vs. Brant, 10 How., 348, 370.
Menard vs. Massey, 8 How., 293, 306–7.
Berthold vs. McDonald, 22 How., 334, 341.
Burgess vs. Gray, 16 How., 48, 65.
West vs. Cochran, 17 How., 403, 413, 414.
Willot vs. Sandford, 19 How., 79, 82.
Magwire vs. Tyler, 1 Black, 195, 199.

Lafayette's Heirs vs. Kenton, 18 How., 197.
Doe vs. Braden, 16 How., 635, 657.
Foster vs. Neilson, 2 Pet., 253, 307, 309.
Garcia vs. Lee, 12 Pet., 511, 520.
Les Bois vs. Brammell, 4 How., 449, 461.
Chouteau vs. Eckhart, 2 How., 345.
Cary vs. Curtis, 3 How., 236, 245.
Haile vs. Gaines, 22 How., 144, 160.

II. That the title does not pass from the government until its assent to that effect is given; that such assent consists in the acts of those agents whom Congress, by its rules and regulations, has specially authorized to carry out its laws; and that the acts of such agents can be shown only by the formal, authentic, written evidence thereof prescribed by the laws of Congress. II.

That Congress has not only the power to choose its own agents, but also to prescribe the method of their action; and that no other agents than those selected by Congress can act for it, and no other evidence than that prescribed by it is binding on the government.

Lesseur vs. Price, 12 How., 59, 74.
Wilcox vs. Jackson, 13 Pet., 498.
Bagnell vs. Broderick, 13 Pet., 436, 448.
Berthold vs. McDonald, 22 How., 334, 341.
Burgess vs. Gray, 16 How., 48, 65.
West vs. Cochran, 17 How., 403, 413–4.
Willot vs. Sandford, 19 How., 79, 82.
Lafayette's Heirs vs. Kenton, 18 How., 197.
Haile vs. Gaines, 22 How., 144, 160.

III. That this rule is applicable to what may be considered equitable rights as well as legal; that no court of equity can determine that any other person than the grantee of Congress is entitled to the land, and by decree defeat the will of Congress; that inchoate or inceptive claims upon the government for title are cognizable only by the political department, and when it grants title to one person, all such inchoate and inceptive claims in favor of other persons become extinguished and incapable of prosecution in a court of justice. III.

Les Bois vs. Brammell, 4 How., 449, 461.
Landes vs. Brant, 10 How., 348, 370.
West vs. Cochran, 17 How., 403, 413.
Magwire vs. Tyler, 1 Black, 195, 199.
Haile vs. Gaines, 22 How., 144, 160.
Lafayette's Heirs vs. Kenton, 18 How., 197.
Bissell vs. Penrose, 8 How., 317.
Chouteau vs. Eckhart, 2 How., 344.

IV. IV. The courts have no authority to determine when a claim to lands becomes a vested right, in anticipation of the final action of Congress, by itself or through its agents, thereon, and therefore can do so only on the evidence so furnished under the laws of Congress; so that in deciding upon such question, both as to the time when the court may decide, and as to the decision itself, it can only follow, and cannot go before nor contrary to Congress.

Any qualification of this principle is to divide the sovereign power, as to the disposal and government of the public lands, without any line of division being traced in the Constitution. This would open the way for conflict of jurisdiction between the legislative and judicial branches of the government.

Wilcox vs. Jackson, 13 Pet., 498.
Haile vs. Gaines, 22 How., 144, 160.
Burgess vs. Gray, 16 How., 48, 65.
Berthold vs. McDonald, 22 How., 334, 341.
West vs. Cochran, 17 How., 403, 413.
Lafayette's Heirs vs. Kenton, 18 How., 197.
Doe vs. Braden, 16 How, 635, 657.
Foster vs Neilson, 2 Pet., 253, 307, 309.
Garcia vs. Lee, 12 Pet., 511, 520.
Bell vs. Hearne, 19 How., 252, 262.
O'Hanlon vs. Perry, 9 Missouri Rep., 804.
Lewis vs. Lewis, 9 Missouri Rep., 186.
Foley vs. Harrison, 15 How., 433.

V. V. The cases decided by the Supreme Court of the United States, where courts of chancery have interposed in behalf of pre-emption claimants, have been in conformity with the above propositions. In those cases, so far

as examined here, the courts have invariably first sought for the evidence of title in the complainant, furnished by the agents of Congress, in conformity with its rules and regulations, and not entertained jurisdiction of any claims asserted, excepting on such *documentary* evidence; next it has ascertained that the government has parted with all interest in the property and control over it, by having issued a patent therefor.

On its thus being conclusively shown that Congress has furnished evidence of individual or vested rights, it has then so far taken jurisdiction of the private rights as to investigate whether or not the complainant has been deprived of his patent by the fraud of the patentee, by imposing false testimony on the register and receiver.

If the court finds the fraud, then, as the title has passed out of the government into an individual, and thus become vested, no conflict of jurisdiction can arise; Congress has parted with all control over the subject, and the fraud alleged enables the court to apply the same rules of chancery to the decision of the special tribunal that it could to the final judgment of any common law court, and annul the same; for in doing so private rights alone are involved.

Lytle vs. Arkansas, 9 How., 314.
Garland vs. Wynn, 20 How., 6.
Haile vs. Gaines, 22 How., 144.
Bernard vs. Ashley, 18 How., 43.
Cunningham vs. Ashley, 14 How., 377.
Magwire vs. Tyler, 1 Black, 195, 199.
West vs. Cochran, 17 How., 403, 413.

I. We proceed now in support of the first proposition. I.

Article IV., section 3, of the Constitution provides: "Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."

It is contended, that under this clause of the Constitution, whatever disposition of the public lands is made by Congress, it is not within the power of the judiciary to restrain or limit, or divest; and rules or regulations made

by Congress respecting the disposal of such lands, the courts are, by the Constitution, inhibited from interfering with.

The jurisdiction of the courts does not arise as to the title until after Congress has disposed of it—that is, the courts have no jurisdiction over the lands as such: while public, and so long as the fee remains in the government, it is for Congress alone to dispose of it; also to make the rules and regulations shaping such disposal.

Landes vs. Brant, 10 How., 348.

Landes vs. Brant, 10 How., 348, 370, says: "The only question decided in Chouteau vs. Eckhardt, 2 Howard, 345, and in Les Bois vs. Brammell, 4 How., 449, was, that when Congress confirmed and completed an imperfect claim, and then confirmed another and different claim for the same land, the older confirmation defeated the younger one; nor could a court of justice go behind the first confirmation, and ascertain from facts and title papers which claimant had the better orignal equity. That if this was allowed, then the first confirmation could be overthrown by the courts, and the *action of the political department*, in all cases of double confirmation, would have *no conclusive force* when the courts were resorted to."

Menard vs. Massey, 8 How., 293.

In Menard's Heirs vs. Massey, 8 How., 293, the interest of the holder of an inchoate title was pressed as obligatory on the government, and entitled to the protection of the courts. On pp. 306, 307, the court distinctly assert, that such equities cannot be enforced by the courts, and it belongs exclusively to the political power to deal with them, saying: "Such claimants were not regarded as owners of land until the *real title* was *delivered completed*. * * * It was therefore manifest, that claims resting on the first incipient steps, must depend for their sanction and completion upon the sovereign power. * * * No standing, therefore, in an ordinary judicial tribunal, has ever been allowed to these claims, until Congress has confirmed them, and *vested the legal title in the* complainant. Such, undoubtedly, is the doctrine assumed by our legislature."

Wilcox vs. Jackson, 13 Pet., 498.

And, in Wilcox vs. Jackson, 13 Pet., 498, the court undertook to define most accurately the power of Con-

gress; not only over the public lands; but also over the effect of acts of its officers in relation thereto. There the plaintiff held regular evidence of his entry and purchase of the land by the certificate of the register, and on that he sued in ejectment to recover possession. As the government was in possession; holding the land by an officer; the court had to decide whether, in withholding the patent, it really thereby retained the power of control over the property; and, in coming to the conclusion that it did, the court held that the government fell back upon its constitutional power. Thus, (p. 516): "But the property in question was a part of the public domain of the United States. Congress is invested by the Constitution with the power of disposing of and making needful rules and regulations respecting it."

The rules established by Congress therefore alone are to determine all questions affecting the disposition of public lands. "Now, if it were competent for a state legislature to say, that notwithstanding this, the title shall be deemed to have passed, the effect of this would be, not that Congress would have the power of disposing of the public lands, and prescribing the rules and regulations thereof; * * that would make the laws of Illinois paramount to those of Congress, in relation to a subject *confided* by the *Constitution* to Congress only."

In this case the party was claiming to have control of the land and its title under the certificate of the register and receiver, which the government was placing its constitutional power in opposition to. What difference in effect or principle is there between this case, and that at bar where the government exercises its constitutional power, by means of an act of Congress; and by law arrests the process of title; and directs the land to be disposed of in a different manner than it would have been had Congress not so acted? The case at bar is the stronger. The court here holds that Congress retains its constitutional power unimpaired, until it has given the "complete title." (P. 516.)

The reasoning and principle recognized in the case of Cary vs. Curtis, (3 How., 236, 245,) may be well applied

Cary vs. Curtis, 3 How., 236, 245.

to this case. The question there arose as to a matter within the exclusive jurisdiction of Congress—the public revenue—and an object of the law before the court was to secure uniformity of practice in carrying out the general system of Congress. It was objected that the law in confiding the legal questions to the executive officers, cut individuals off from their rights to sue in the courts, and thus the court speak, (p. 244–5,) "It is contended, however, that the language and the purposes of Congress, if really what we hold them to be, cannot be sustained, because they would be repugnant to the Constitution, inasmuch as they would debar the citizen of his right to resort to the courts of justice. The supremacy of the Constitution over all officers and authorities, both of federal and state governments, and the sanctity of the rights guaranteed by it, none will question. These are *concessa* on all sides. The objection above referred to admits of the most satisfactory refutation. This may be found in the following positions, familiar in this and in most other governments, viz: That the government, as a general rule, claims an exemption from being sued in its own courts. That, although as being charged with the administration of the laws, it will resort to those courts as means of securing this great end, it will not permit itself to be implicated therein, save in instances forming conceded and express exceptions.

Judicial power limited by acts of Congress.

Secondly, in the doctrine so often ruled in this court, that the judicial power of the United States, although it has its origin in the Constitution, is (except in enumerated instances applicable exclusively to this court) dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress, who possess the sole power of creating the tribunals (inferior to the Supreme Court) for the exercise of the judical power and of investing them with jurisdiction, either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good. To deny this position would be to elevate the judicial over the legislative branch of the government; and to give

to the former powers limited by its own discretion merely. It follows, then, that the courts created by statute, must look to the statute as the warrant for their authority. Certainly they cannot go beyond the statute and assert an authority with which they may not be invested by it; or which may be clearly denied to them. This argument is in nowise impaired by admitting that the judicial power shall extend to all cases arising under the Constitution and laws of the United States.

Perfectly consistent with such an admission is the truth, that the organization of the judicial power, the definition and distribution of the subjects of jurisdiction in the federal tribunals, and the modes of their action and authority, have been, and of right must be, the work of the legislature. The existence of the judicial act itself, with its several supplements, furnishes proof unanswerable on this point. The courts of the United States are all limited in their nature and constitution, and have not the powers inherent in courts existing by prescription or by the common law. In devising a system for imposing and collecting the public revenue, it was competent for Congress to designate the officer of the government in whom the rights of that government should be represented, in any conflict which might arise, and to prescribe the manner of trial. It is not imagined that by so doing Congress is justly chargeable with usurpation, or that the citizen is thereby deprived of his rights.

There is nothing arbitrary in such arrangements—they are general in their character, are the result of principles inherent in the government, are defined and promulgated as the public law. A more striking example of the powers exerted by the government in relation to its fiscal concerns, that is seen in the act of 1839, is the power of distress and sale authorized by the act of Congress of May 15th, 1820, (3 Story, 1791,) upon adjustments of accounts by the First Comptroller of the Treasury. This very strong and summary proceeding has now been in practice for nearly a quarter of a century without its regularity having been questioned so far as is known to the court. The courts of the United States can take

cognizance only of subjects assigned to them expressly or by necessary implication; *a fortiori* they can take no cognizance of matters that by law are either denied to them, or expressly referred *ad aliud examen.*"

II. Proposition.

II. PROPOSITION.—*Assent and Evidence of Title.*

The Courts can not come in and fasten their process on the inceptive title, pending the disposal of the lands, so as to give the land to B when Congress, at the very same time, by the operation of its rules and regulations, gives it to A.

Lesseur vs. Price, 12 How., 59.

In Lesseur *vs.* Price, (12 How., 59.) There was a conflict between opposing claimants for the title of the government. The plaintiff claimed under the act of 1815, which authorized him to enter lands under specific regulations. A survey was necessary; the court say it was to consist of a plat of survey, and a certificate describing the land, with the name of the claimant for whom the location by survey was made.

The claimant contended that his entry was complete, because he had performed all the acts required by the law to be done by him. On page 73 the court say: "The location must of course be an appropriation of the land, and its acquisition by the locator, with the corresponding right to possess and enjoy it, as against the United States; and the inquiry arises, what acts were required on the part of the locator to divest the United States of title?"

The party was required by the law to apply to locate his certificate to the surveyor, whose duty it was to survey the land and return the survey and notice, to the recorder of land titles, who made a report thereof to the Commissioner of the General Land Office, who then gave to the party a patent certificate. The notice of location was made on the 2d June, 1821, and it was contended (p. 74) that this was the inception of the title and location in fact. The survey was made 5th August, 1821, and filed the 11th February, 1822, and patent certificate issued 25th February, 1822, and patent 13th November, 1822.

The defendant claimed under the act of Congress of 6th March, 1820, which directly granted four sections of land to the State of Missouri and authorized the legislature to locate them; and this location was made 28th of June, 1821, which was twenty-six days after the plaintiff had taken the first step to locate his grant by the prior law of 1815.

Therefore the direct question to be decided by the court was, whether the act of *the party* himself was binding on the government, or whether, in order to bind it, some corresponding act on its part was not necessary, to show its assent to the entering into the contract of purchase, by the locator; and also the further question, as to whether any other evidence of this assent could be given, than that provided by law; namely, a performance by the officers of the law of those acts prescribed by the rules and regulations of Congress for the disposal of the public lands; or whether the locator could establish his right by other proof thereof, than that furnished by the officers of government in conformity with the regulations of the law.

Assent of the United States.

The court, in speaking of the first step in the title, the notice, say (p. 74): "That it was the mere act of the party, not having the assent of the government, must be admitted." And, in speaking of his evidence (p. 74): "And what was the character of the evidence he had to rely on then? His entry was to be made by the surveyor. * * * It was to consist of a plat of survey, and a certificate describing the land, with the name of the claimant for whom the location by survey was made. This return the recorder had to examine, pass upon, and record. If the location and survey had been properly made; then the United States *assented* to the exchange; and *not until then*. The danger of allowing a claimant to locate a floating warrant at his own discretion, threatened the country with evils that afflicted some of the elder states. It would have been certain to produce conflict of claims for the same land to a material extent, and contrary to a settled policy of the United

Evidence.

States in disposing of the public lands, which was to avoid such conflict."

And in speaking of the title of the defendant, which originated under a later law, the court decide that it attached to the land, because the assent of the government was given to it.

After detailing the steps which completed the defendant's title, the court say, (p. 77,) "the United States assented to this mode of proceeding, nor can an individual call it in question."

The principle decided in this case is not affected by the fact that the locator paid for his new land by an exchange of old land relinquished.

The Supreme Court has, in many cases, asserted the unlimited power of Congress over the public lands, until the title is parted with by it; and it is in support of this power—a necessary principle—that conclusive and paramount force shall be attached to a patent. The patent reflects the image and character of the government, of which it is the type. Before it shall issue, Congress, by the tests that it prescribes; and not by any legally supposed to be the equivalent thereof; directs that the officers of the law shall arrive at certain results. The case of Bagwell vs. Broderick, 13 Pet., 436, 448, where it it was contended that the act of the party, in giving a notice to the surveyor of his location of land, should be held to be the first step, denies that this is a correct proposition; maintaining that whatever may be the right of the party to have the officer act; until he does act and furnish that evidence of his action prescribed by Congress, the title has not begun. Thus, on p. 448: "The United States never deemed the land appropriated until the survey was returned; * * then the notice of entry might be, in form, inconsistent with the laws of the United States. * If no such objection existed, it was the duty of the surveyor to conform to the election made by the claimant having the location certificate from the recorder. Still, the *only evidence* of the location *recognized by the government* as an appropriation was the plat and certificate of the surveyor."

Bagwell vs. Broderick, 13 Pet., 436.

Evidence.

And, arguing the reason why not the acts done by the party in the initiation of the title, but the acts of the officers of the government given in the prescribed shape, and thus showing the *assent* of the government, the court say, (p. 450): "Congress has the sole power to declare the dignity and effect of titles emanating from the United States. * * * Until the issuance, (of the patent,) the fee is in the government," &c. And, on page 451: "We deny that the states have any power to declare certificates of purchase of equal dignity with a patent. Congress alone can give them such effect."

Burgess vs. Gray, 16 How., 48–65, thus speaks: "The defendants are in possession, claiming title from the United States, and with evidences of title derived from the proper officers of the government. It is not necessary to inquire whether the title claimed by them is valid or not. The petitioner, as appears by the case he represents in his petition, has no title of any description derived from the constituted authorities of the United States, of which any court of justice can take cognizance. And the mere possession of public land, without title, will not enable the party to maintain a suit against any one who enters on it; and, more especially, he cannot maintain it against persons holding possession under title derived from the proper officers of the government. He must first show a right in himself, before he can call into question the validity of theirs.

Burgess vs. Gray, 16 How., 48.

Evidence.

Whatever equity, therefore, the plaintiff may be supposed to have, it is for the consideration and decision of Congress, and not for the courts. If he has suffered injury from the mistake or omission of the public officer, or from his own ignorance of the law, the power to repair it rests with the political department of the government, and not the judicial. It is expressly reserved to the former by the act of Congress."

Equity.

Berthold vs. McDonald, 22 How., 334–41, in speaking of the previous decisions of the courts on inceptive titles, holding that they do not constitute the basis of a suit, says: "And this for the plain reason that neither (party) had had any title, when the act of 1812 was passed, that

Berthold vs. McDonald, 22 How., 334.

could be asserted in a court of justice; and as the political power; from which alone they could take title; had cut them off, to that power they must look for redress of the injury, if any existed. To conflicts of title of the foregoing description, the principle asserted in Landes vs. Brant, 10 How., 370, apply."

Arkansas hot springs title.

Hale vs. Gaines, (22 How., 144,) was an ejectment in State Court of Arkansas, neither party professing to have the legal title. It was for the Arkansas hot springs.

Hale vs. Gaines, 22 How., 144.

The plaintiff, Gaines, in 1851, had been allowed by the register and receiver to enter the land under pre-emption act of 1830, and the state court held such entry to be valid and decided in his favor under the state law, authorizing recovery in ejectment on such title.

The defendant relied upon two defences. 1st. He claimed title under a New Madrid location, which the court carefully examine (on p. 158 and 159) and hold to be invalid.

2d. (p. 145.) "The defendant below, Hale, claimed to hold by virtue of the 5th section of the pre-emption act of 12th April, 1814, (3 S., 122,) together with the act of 1st of March, 1843, (5 S., 603.) The jurisdiction of this court was therefore clear."

This pre-emption title was on the settlement made on the land by John Percifull prior to the act of 1814, which (on p. 146) is said to be the "principal point in the case," and an elaborate argument in support of this pre-emption title is made on page 146 to 154. "The record shows Hale's title to be derived from Percifull, who settled on the land in 1812, and occupied for many years. It was afterwards questioned whether the act of 1814 secured him the pre-emption right on account of the non-extinction of the Indian title. "The remedial act for the benefit of pre-emptioners under the act of 1814 was passed 1st of March, 1843." (p. 147.) A question before the court was, therefore, on the title of Hale under the pre-emption act of 1814, and its remedial act of 1843.

On pages 152–3 it is shown that the register and receiver acted on the pre-emption claims of both parties, and it was urged, that the claims of Hale thus decided

against by the register and receiver should be investigated by the court, and held valid. Thus, "Is the *false decision* of the register and receiver in such a case to preclude forever the just claims which have been either corruptly or capriciously and perversely ignored?" And on page 154 he urges "no opportunity was given to prove fraud," and the cases of Lytle vs. Arkansas, and others of that class, were relied upon. And it was further urged that then was the fitting time to examine into the wrong and unlawful decision of this special tribunal, before either party was furnished with conclusive evidence of title. Thus, (on p. 154,) "The action of the register and receiver being incomplete, their judgment being inoperative, and the grant suspended, the *courts must examine the facts* in order to ascertain which party under the laws is entitled to hold the land."

The court, (on p. 161,) after referring to the act of Congress of 20th April, 1832, which reserved from sale the hot springs and four sections of land, including them as their centre, and also referring to the decision of the Arkansas state court refusing to sustain the above proposition of law, adds "but this is of little consequence, as when the act of April, 1832, was passed, reserving the hot springs from sale; Percifull had no vested interest that a *court of justice could recognize.*" Vested interest.

"Then the United States Government was the legal owner; and had the power to reserve it from sale, so that the offer to purchase in 1851, under the assumed preference to entry claimed for Percifull, was inadmissible. Had the entry been allowed in face of the act of Congress such proceeding would have been merely void." Power of Congress.

And, on p. 160, the court say that a party thus appearing in court; while the title of the land is in the United States; has no standing whatever before the court. After stating that the state court had decided that the entry under which Gaines claimed was valid; and thus sustained the action of the register and receiver in allowing such entry, the court say: "Moreover, the plaintiff in error (Hale) is not in condition to draw in question the validity of Belding's entry. He relies on an outstanding title in

the United States to defeat the action. Being a trespasser without title in himself, he cannot be heard to set up such title."

The Supreme Court of the United States did not consider that the state court had decided against the title of Hale, under the act of 1814, on the ground that Hale had no evidence that a court could notice of any interest under that pre-emption law. It held that where the act of Congress reserves land from sale and thus forbids an entry under a prior law, under which inceptive steps had been taken, no proof that the party was entitled to enter the land under the prior law will place him in court as clothed with rights under the prior law.

Lafayette's heirs vs. Kenton, 18 How., 197.

And, in Lafayette's Heirs vs. Kenton, 18 How., 197, where the plaintiff by law was allowed to locate his warrants on any lands, the property of the United States, after the officers of the United States had decided that a part of the lands within the out-boundaries of his patent were excluded, the court held that the evidence of title was only that furnished under the laws of Congress by the executive department, which alone was competent to settle such questions, basing its decision, not on the merits of the case, but on the constitutional question. Thus, on p. 199, the court say: "As respected these private rights, Congress reserved to itself the power to deal with them by *such means as were deemed appropriate.* * * The courts of justice have no power to revise what Congres, or *commissioners, acting by its authority*, have done in their confirmations of the titles here assailed."

Evidence.

Fletcher vs. Peck, 6 Cranch, 87.

Until the agents of the government act, the government itself does not act, as said in Fletcher vs. Peck, 6 Cranch, 87, (2 Pet. Cond., 319): "It is, however, to be recollected that the people can act only by these agents, and that, while within the powers conferred on them, their acts must be considered as the acts of the people." And, as stated in Lesseur vs. Price, 12 How., 59, 74, that the government's assent to the act of a party was proven by the act of its agent, thus: "This return the recorder had to examine * * if the location and survey had been properly made, (evidenced by his action,) *then* the

U. S. acts by its agents.

United States assented to the exchange, *and not until then.*" Now, here, until the agents to carry out the law as prescribed by the law act, perform the duties imposed upon them, the government has not acted; and this postpones the action of the courts in relation to the title, unless the judicial department can dispose of the public territory in advance of Congress. Such position is contradicted by the above cited cases, holding that the courts can determine individual rights in lands only on the evidence of title furnished by Congress; and that, when furnished; it is binding on the government, and every branch thereof; and on all individuals.

Now, can the courts take this evidence when furnished, and hold it to have the effect of conferring rights directly in opposition to the declared will of Congress? That is, while it is admitted by the courts that Congress may establish the rule; yet the courts may, by construction; give it such effect as to defeat the expressed will of Congress.

It will be observed by the language above quoted from West and Cochran, and Lafayette vs. Kenton, &c., the court say that this matter of disposing of the public lands, including also the rules of evidence by which its acts are known, are acts of a "*sovereign power.*" What meaning attaches to this term, selected here as the forcible expression needed to carry the idea? The court was urged to entertain jurisdiction of the matters which the executive officers; as agents of Congress; had disposed of. In the notable case of West and Cochran, and Maguire and Tyler, the matter being pressed in both forms of law and equity; the court, with all the meaning that language is capable of; assert their inability to touch the question, by showing that these questions affecting the disposal of the public lands lie in that portion of the sovereign power, carved out by the Constitution as the division belonging to Congress alone.

That which the Constitution, in specific, clear terms, places in the hands of Congress, it should certainly not require any further argument to settle, that the judiciary or executive may not touch.

In the above cases, and others decided, the readiness of the court to yield to the rules established by Congress in relation to matters over which it has jurisdiction, is clearly shown.

Doe vs. Braden, 16 How., 635.

This is forcibly illustrated in the case of Doe vs. Braden, 16 How., 635, 657, on the conclusive effect of the action of Congress over legal questions that lie involved in its action, under the treaty-making power, where the court say: "But these are political questions, and not judicial. They belong exclusively to the political department of the government." And, in Foster and Elam vs. Neilson, 2 Pet., 253, 307, 309, in relation to questions arising on a treaty, the court use language that well might be applied here: "The judiciary is not that department of the government to which the assertion of its interests against foreign powers is confided, and its duty commonly is to decide upon *individual rights, according to those principles which the political departments of the* nation have estab-established." (P. 307.) And, on p. 309, * * "If the legislature has acted on the construction thus asserted, it is not in its own courts that this construction is to be denied."

Foster vs. Neilson, 2 Pet., 253.

Garcia vs. Lee, 12 Pet., 511.

And, in Garcia vs. Lee, 12 Pet., 511, 520, in commenting on the above case, the court say: "The leading principle of the case, which declares that the boundary line determined on as the true one, by the political departments of the government; must be recognized as the true one by the judicial department."

III. Proposition.

III. Proposition.

Thus all questions affecting the disposal of the public lands; which means granting the fee thereto; belong exclusively to Congress; and hence whatever questions of right may arise between individuals to obtain such title from the government, they are disposed of and involved in the act of the government in granting the fee; they cannot be heard in any other forum, nor survive such exercise of power by Congress.

The Supreme Court of the United States, as early as

1838, in the case of Strother vs. Lucas, 12 Pet., 410; next in Chouteau vs. Eckhardt, 2 How., 344, in 1844; and in Bissell vs. Penrose, 8 How., 331; Menard vs. Massey, 8 How., 306, in 1850, and in a series of cases, coming down to the present day, have uniformly, and without variation, held that it has no jurisdiction to decide upon *questions of equity* arising against *any action of Congress* disposing of the public lands; that acts of Congress control and dispose of all equitable, as well as legal, questions.

This is pointedly illustrated in the following cases, in which it will appear, that the court limits its range of investigation by the declared will of Congress; and, therefore, does not enter upon grounds of inquiry as to individual rights, until Congress has finished its work, and opened the doors, for the courts and the public, to commence their action; and, even then, the courts recognize and adopt the principle of the paramount power of Congress; by holding, that the evidences of title furnished by Congress, are conclusive as to the effect and extent of the grants made by it.

West vs. Cochran, 17 How., 403.

In West vs. Cochran, 17 How., 403, the plaintiff had, in 1811, been confirmed by a Board of Commissioners in his claim to lands, and the tract confirmed had been designated by a Spanish survey; but Congress authorized the special tribunal, where it saw proper, to direct a new survey by the United States surveyor. West, relying on his title as settled by the confirmation, sued thereon, maintaining that in the courts he had a standing thereon. The defence against that title was that, under the regulation prescribed by Congress, the *only evidence* of title that the courts could know it by was that *prescribed by Congress*, and that no other evidence was competent to show title. P. 413, the court say: "The United States reserved the power to locate *by survey*, * * and, *by such survey*, to separate it from the public lands, and from the lands claimed by others, and to issue a patent therefor." And, on p. 414: "It has often been held by this court, that the judicial tribunals, in the ordinary administration of justice, had no jurisdiction or power to deal with these *incipient* claims; either as to fix-

Evidence.

ing boundaries, or for any other purpose; but that claimants were compelled to rely on Congress; on which power was conferred by the Constitution, to dispose of and make all needful rules and regulations respecting the territory and property of the United States. Among these *needful regulations*, was that of providing that these unlocated claims should be *surveyed by lawful authority*—a consideration that has occupied a prominent place in the legislation of Congress from an early day."

Here, then, the case turned upon the simple question of what was competent *evidence* of the right? The plaintiff asked the court to recognize his incipient right as sufficient to entitle him, by the common rules of law as to evidence, to prove them up. The court holds that when Congress says it will furnish the evidence of the right, that no other kind will be admitted; and that until it does so furnish it, the party has not that right which enables the courts to take jurisdiction of his case; and, then, for the *reason* of its ruling, refers to the *exclusive power* over such matters *given by the Constitution to Congress.* This decision was made in 1854.

Willot vs. Sandford, 19 How., 79.

At the next term of the court was decided the case of Willot vs. Sandford, 19 How., 79, in which the plaintiff endeavored, under a junior title, to recover against an elder title, by attempting to disprove the correctness of the *fact of location*, of which fact the defendant held the evidence, furnished under the act of Congress. Here, then, came up a further question on such evidence. The court below held that such evidence furnished by the United States was *evidence of a "high character,"* but "not conclusive." The real question here then, was, if it was the *only evidence* that the courts could take jurisdiction of title on; and the court so held. On p. 82, the court say: "Nor have the courts of justice any authority to disregard surveys and patents, when dealing with them in actions of ejectment." This court so held in West vs. Cochran, 17 How., 403.

Evidence.

Magwire vs. Tyler, 1 Black, 195.

The next case is West and Cochran, again in the equity form, under the name of Magwire vs. Tyler, 1 Black, 195; for it was supposed that the above doctrine would not

restrict the equity powers of the court. Thus, the court speak, on p. 199, referring to West vs. Cochran: This court there "held that the power to survey * and issue a patent * was a *sovereign power*, reserved to the executive branch of the government, and that a court of justice had no jurisdiction to locate the claim. The unsuccessful party then filed *his bill* in a state circuit court, and insists that *equity* can do what was declared could not be done at law." The court then examine into the title, and refuse to grant the relief, showing that the executive branch of the government had disposed of the complainant's rights adversely to him; and that was final in equity, for the same reason as in law—the want of power in the court to make evidence for itself, or to act upon any other evidence than that furnished by the rules of Congress. This was in 1861.

The decision of the Supreme Court of Missouri, in 25 Missouri Rep., p. 503, which was appealed from and affirmed in the equity cause, (1 Bl., 195,) very clearly runs the line between the jurisdiction of the executive and judiciary on this class of questions. That court says that complainant's title was an equity, if not more, thus: "It cannot be doubted that Brazean's confirmation was at *least an equity;* (* * * but) who is to determine it. The answer settles this controversy. If it is a question of fact, to be investigated and determined by courts of justice, the bill in this case is not subject to demurrer; but if, as the court said in West vs. Cochran, (17 How., 403,) it is a question to be determined by the executive department of the United States, then Brazean's equity is to the land which they designate, and not to that which we might determine. * * * If injustice is done him, it is by the *political sovereignty*, and to redress such injuries is not within the province of the courts."

25 Missouri Rep., 503. Magwire vs. Tyler.

And, in Bissell vs. Penrose, 8 How., 317, considered and decided at the same time; in which the same considerations were urged upon the court; the court emphatically shows its relief, in being discharged from the consideration of the equities of the parties; of this uncertain inchoate character; when the government was the real

Bissell vs. Penrose, 8 How., 317.

party, against whom the equity arose; by referring the decision of the case to Congress; in this language: "The case before us depends upon the construction of our own acts of Congress, disembarrassed from any inquiries into the origin of these grants, or into the rights and principles upon which they were founded, or which made it the duty of the government, under the treaty, to acknowledge them. Inquiries of this kind were closed * * by the act of 1836. The title *then became complete.*"

Chouteau vs. Eckhardt, 2 How., 344.

In Chouteau vs. Eckhardt, 2 How., 344, the language of the court; in disposing of the obligatory force of these inceptive equities, on the government: very clearly recognizes the principle that such questions are, by the Constitution; referred exclusively to Congress—thus: "This obligation, sacred as it may be, *in any instance*, cannot be enforced by any action of the judicial tribunals."

Fraud.

The Supreme Court has held in a series of decisions on laws in which special tribunals were constituted as agents of Congress to carry out the rules and regulations established for the disposal of the public lands, that the courts must construe and declare the meaning of such laws, for the purpose of ascertaining whether the acts of the officers are within their powers as conferred by the laws; and if they are; they hold the decisions of the officers to be final and not subject to examination in the courts. But the court recognize not only acts done under a misconstruction of the law; but also acts procured by fraud and imposition on the officers; as acts not protected by the principle, that the conclusions of the special tribunal are final, and beyond the power of the courts to examine. This is a mere application of the fundamental rule of equity; to the doings of these special tribunals; that fraud vitiates everything into which it enters. The same rule enables a court of equity, to annul the judgment even of a court of common law.

None of these decisions hold that the courts can annul

or modify the rules laid down by Congress; nor that the court can substitute itself in the place of the special tribunal or officer; nor annul or modify his decision, or act, by substituting its opinion on the facts which the officer finds, in lieu of his. The court can decide that the officer has exercised powers not conferred by the law; it can decide that *within its range of powers* fraud has been practiced. It can not find, that fraud or undue influence has been practiced, in procuring the law which establishes the tribunal and its powers.

It is not pretended here, that any act has been done by any officer beyond his power under the law; but it is contended, that fraud has been practiced in procuring such acts.

The Bill.

The facts constituting the fraud are not specifically alleged; but it would appear from the statements in the amended bill; that the defendant suggested to, and solicited the Commissioner of the General Land Office, that he should cause the public surveys of the lands embraced in the Soscol ranch, to be suspended, so as to render it impossible for the plaintiff to procure the evidence of his right to a patent to such lands; which right to a patent existed because the general laws authorized pre-emption settlements on public lands before survey thereof.

The naked request to the officer to suspend the survey of land in the occupation of the plaintiff, is no act of fraud. It is not pretended that he sought corruptly to influence the commissioner. But the bill charges that he made suggestions to the commissioner. Of what? Of any private considerations; of any matter that it would be contrary to good morals or public policy that the commissioner should know? Is it *malum prohibitum* or *malum in se* for the commissioner to have suggested to him by the defendant, that that claim of title which had been decided to be valid by the commissioners in California, and by the district court there; on faith of which cities had been built; had actually been presented to Congress for special confirmation.

The part performed by Congress.

It was within the power of Congress at that stage of the facts to give this land to the Vallejo claimants on such terms as it should prescribe, or it was not.

The question here is, did Congress so give it; or is the contrary purpose of Congress, to give it to the claimants under the general laws, being so defeated by the fraudulent contrivance of the defendant, as to require the interposition of a court of chancery?

Now how could any contrary claim be gotten up against the general claimant, unless it was based on the will of Congress? The answer to this question is given by the act of 1863.

But the plaintiff insists that, although he has not acquired the title; yet he would have acquired it, had the officers of the government performed their duties, before Congress changed the law.

Is it not this change of the law that has destroyed the plaintiff's basis of title? and how can any inceptive rights survive such change of law, so as to enable the courts to take away the title specifically conferred by Congress on the Vallejo settlers, on the grounds of treaty obligations, and settlement and improvements made, of great value, in good faith; and grant it to a third party on totally different considerations?

Congress took up the memorial of the defendant, in which at length he spread before it, the events of the past. It saw that as a fact the Vallejo grant had been, before the cession of the country by Mexico to the United States, recognized as valid for some purpose, for it made the grantee's possession rightful; his possession was protected and cherished, and thus passed under the laws of the United States, by force of the Treaty of Guadaloupe Hidalgo. The first act of the Congress—that of 1851—was to establish as the rules by which claims should be determined, the spirit of the treaty, the law of nations, the laws, usages and customs of the government from which the claim is derived, the principles of equity, and the decisions of the Supreme Court of the United States.

Under this act, and the protection its construction by the tribunals of the government conferred upon the settlers, the possession and improvements of one man spread and multiplied into the possession and improvements of communities.

The decision of the supreme court in 1861 turned this security into confusion. So firmly fixed and deep rooted were the possessors of the land; from their former security and long-continued settlement; that possessions remained unchanged after the decision, excepting where interrupted by speculators, who found an opening for their enterprise, as they supposed, under this decision of the supreme court. On this state of facts it was that Congress acted.

Treaty clauses.

The treaty thus spoke: "In the said territories, property of every kind, now belonging to Mexicans not established there, shall be inviolably respected. The present owners, the heirs of these, and all Mexicans who may hereafter acquire said property, shall enjoy, with respect to it, guarantees equally ample as if the same belonged to citizens of the United States."—Art. 8th. "For the purpose of giving to these stipulations the fullest possible efficacy, thereby affording the security and redress demanded by their true spirit and intent, the government of the United States will now and hereafter pass, without unnecessary delay, and always vigilantly enforce, such laws as the nature of the subject may require."—Art. 11, 9 Stat., 929, 931.

Is it for the court to limit the exercise of the power of Congress in legislating to carry out its views of the treaty stipulations, or to interpose after such law passed, so as to restrain its effect?

That the courts have no jurisdiction over questions which arise as to the action of the other branches of the government, in compliance with treaty stipulations, has been decided in Doe *vs.* Braden, (16 How., 635, 657,) in which a question arose as to the power of the King of Spain, before the cession of Florida, to annul a grant of lands made by him. The clause annulling the grant was inserted as one of the terms in the treaty.

Doe vs. Braden, 16 How., 635.

It was urged that the power of the king to annul such grant, was negatived by the constitution of Spain. The court say, p. 657: "But these are political questions, and not judicial. They belong exclusively to the political department of the government. * * * And the Constitution declares, that all treaties made under the

authority of the United States shall be the supreme law of the land. The treaty is therefore a law made by the proper authority, and the courts of justice have no right to annul or disregard any of its provisions, unless they violate the Constitution. * * * It was for the President and Senate to determine, whether the king; by the constitution and laws of Spain; was authorized to make this stipulation, or to ratify a treaty containing it. They have recognized his power, by accepting this stipulation as a part of the compact, and ratifying the treaty which contains it. The constituted and legitimate authority of the United States has, therefore, acquired and received this land, as public property. * * * Nor can the plaintiff's claim be supported; unless he can maintain; that a court of justice may inquire whether the President and Senate were not mistaken, &c. But it is evident that such a proposition can find no support in the Constitution; nor in the jurisprudence of any country where the judicial and political powers are separated and placed in different hands. Certainly no judicial tribunal in the United States ever claimed it, or supposed it possessed it."

Courts and Treaties.

If legal questions, lying in the body of a treaty, are not the subject of the exercise of the powers of the judicial department; is it not a correct application of the same principle, to hold, that the law here in question; being rooted in the treaty; is but the discharge of a treaty stipulation, and that questions arising thereon, belong alone to the political department of the government, unless the law conflicts with the Constitution? The exclusive jurisdiction of Congress over rights protected by treaty has been asserted in many cases. In Les Bois *vs.* Brammell (4 How., 449–461) the court say:

"By the treaty the United States assumed the same exclusive right to deal with the title in their political and sovereign capacity, nor could the courts of justice be permitted to interfere; if they could, and by their decrees complete the title, all power over the subject might have been defeated, not by the courts of the Union only, but by the state courts also."

IV. Proposition.

IV. Proposition.

The courts can take no jurisdiction of such supposed rights, because the subject-matter to which they attach is not private property until; and in such wise; as Congress may choose to make it such.

Article III., section 2, of the Constitution provides that the judicial power shall extend to cases in law and equity arising under the Constitution, the laws of the United States, and treaties made under their authority.

As no law of the United States does or could enable the courts to take jurisdiction of these inceptive steps in the title, which are administrative it will be seen, that the application of this clause of the Constitution, is an argumentative denial of the power.—U. S. vs. Ferreira, 13 How., 40, 52.

U. S. vs. Ferreira. 13 How., 40, 52.

But again: Until a case arises there can be no jurisdiction in the courts; and a case can not exist as to public lands, that the judiciary can decide, until a right has vested in an individual. A vested right Congress can not withdraw nor affect. It is that characteristic—of being vested—that passes the control of the public domain from Congress to the judiciary; it can not be partly within the control of each, and the Constitution so clearly confers the control on Congress of the public lands; by the express words above cited; and so clearly negatives it in the courts, by confining their action to "cases," that nothing can be more plain than, that there is no limitation of the power of Congress on this subject; and of course no revising or appellate power in the courts.

Foley vs. Harrison, (15 How., 433,) was a petitory action in which both parties claim title under laws of the United States. The court decides in favor of defendant's title, which was as follows: He had a patent dated September, 1847, issued by the United States (p. 447) under act of Congress of 3d August, 1846, which act provided that the Commissioner, the Secretary of the Treasury, and Attorney General should determine, on principles of equity and justice, as recognized in courts of equity, * *

all cases of suspended entries now existing, and adjudge in what cases patents shall issue. Thus a special tribunal was constituted by Congress with quasi judicial powers. Under this law report was made in favor of defendant, that he was entitled to a patent on entries that he had made on certificates, called Houmas floats.—(p. 448.) These entries of the defendant were applied for before any steps were taken under plaintiff's title, but when the plaintiff selected the land the Commissioner of the General Land Office had suspended defendant's entries and canceled them, and given instructions, under date of 24th December, 1845, that the land was open to selection for plaintiff's title. But as soon as the defendant learned of such instructions he filed a caveat against the completion of plaintiff's title, and on 9th March, 1846, the commissioner suspended the plaintiff's entries. The defendant's entries were not by virtue of a settlement on the land in dispute, but under a float issued on account of his having settled on other land ascertained to be not subject to pre-emption.

The plaintiff's title was equally without the foundation of settlement. It was under the grant by the 8th section of the act of 4th September, 1841, of 500,000 acres of land to the states for internal improvement. This land was in Louisiana, and the legislature, in 1844, established its local land office to dispose of its five hundred thousand acres. On 7th January, 1848, the plaintiff located his state warrant on the land. The lands had been duly surveyed, and were open to entry, and the proceedings under the state were regular.—(p. 447.) "But the state, had not the power to convey the fee, as it had not been parted with by the general government. The words of the act of 1841 are, that there shall be granted to each state, not that there is hereby granted. The words import that a grant shall be made in future."

Here, then, the state had done all it could to perfect its title under the law which promised the land, and the defendant also had pushed his rights as far as he was permitted to do. At this stage of the title the Commissioner of the General Land Office, on his own motion, refused to go on

and carry out the laws in favor of either party, although the laws then in force would have given title. What was the occasion of this action of the commissioner? It was because he saw in advance of the passage of any act of Congress, that a law would probably be passed, and thus on the 9th of March, 1846, he wrote to the register and receiver, that as Congress has taken the questions which affect this land into consideration, and is about to confirm the claims of one party, "I, therefore, in order to prevent future inconvenience, deem it proper to direct that all the land embraced by such entries * * be considered as excused from disposition in any way, either by state selection or otherwise.

"The state selections already made will be suspended to await the action of Congress.

"If the contemplated law confirms all entries * it will in all probability defeat all locations made by state selections.

"In the meantime it is necessary that all appropriations of the lands caused by such entries be suspended."

Such was the power exercised by the commissioner. Was it without authority of law? Certainly not; for it was approved by the subsequent action of Congress and by the Supreme Court, and falls within the range of powers of the commissioner as expressed in 19 How., 262.

But what was the motive that led to the exercise of such extraordinary power?

He states it on p. 449—it was in anticipation of the action of Congress, and to prevent individuals from taking such steps under the existing laws as might produce difficulty in the way of executing the future will of Congress. Here the commissioner, regarding himself as the head of the land system under Congress, does not shut his eyes and ears to that which is being done by his principal, but takes care in advance, so far as may be practicable, that all the laws of Congress shall be executed. And so, on the same day, the 9th March, 1846, he suspended the entries of the plaintiff.

But had he power thus to suspend entries? The court say, (p. 450,) "the entries of both claims were suspended

by order of the government." The court, (on p. 447,) after saying that the government had not parted with the fee, add: "It could not have been the intention of the government to relinquish the exercise of power over the public lands that might be located by the state. The same system was to be observed in the entry of lands by the state as by individuals, except the payment of the money, and this was necessary to give effect to the act and to prevent conflicting entries."

Now, the entries of both parties having been stopped, what was next done? Then came the act of Congress, anticipated by the commissioner, of the 3d August, 1846, which, as above set forth, authorized the special tribunal to determine all cases of suspended entries according to general equitable rules, and to adjudge in what cases patents shall issue.

Here, then, Congress interposes and deals directly with these titles; determining by what principles it should part with the fee, and appointing its own agents to decide. But, next, the courts are called upon to review the decision of this tribunal on the rights existing before the law was passed. To this it was objected, that Congress having given no appeal from it, its action was intended to be final; and, 2d, this further view was presented in these words: "The proposition is too clear for argument that the *power of Congress* to dispose of the public lands is *complete and unlimited*."—(p. 444.) And the court, in sustaining these points, say (p. 448): "As this decision was made by a special tribunal, with full powers to examine and decide, and as there is no permission for an appeal to any other jurisdiction, the decision is final within the law."

Here, then, is directly involved the power of Congress over the subject on the point directly argued, and also the conclusiveness of the act of the agent of Congress. The court decide, that the patent issued in pursuance to the decision of the special tribunal, carries along with it the settlement of all anterior questions.

Another question decided in the case also strongly shows the power of the government over the rights of

settlers on the public lands. The defendant's floats were issued in lieu of pre-emption rights which originated in a settlement made on lands actually open for settlement at the time. Thus: there was a confirmation of the Houmas grant, and it was surveyed by authority of law so as not to embrace the land afterwards settled upon; and after such survey, made by authority of Secretary of the Treasury, the register and receiver were instructed to treat the residue of the claim as public lands.

This induced a great many persons to settle on the claim up to the year 1836. In that year, by order of the land office, the register and receiver were directed to withhold from sale the lands within the claim. This suspension was continued, and the patent certificates which had been issued to purchasers were declared to have been issued without authority. Afterwards, in 1844, this claim to its whole extent was recognized as valid by the Secretary of the Treasury, in consequence of which entries made within the grant were canceled, and the purchase money returned. "This action of the Land Office has been referred to for the purpose of understanding the nature of the pre-emption rights acquired by settlers upon the Houmas claim, and the floats which were issued, as above explained, under the law. These floats were issued under the authority of the government, and when presented by bona fide purchasers could not be disregarded. This was the origin of the right set up by the defendant. It has been sanctioned by the Land Office, by the Secretary of the Treasury, and the Attorney General, under the act of 1846, and a patent has been granted." What more striking example can be imagined of the paramount power of the government over the inceptive rights of a pre-emption settler than this?

Here the government had instructed the register and receiver that a certain tract of land, theretofore claimed as private, had been decided to be public, and to allow entries thereof. This induced a great many persons to settle on the land. The government subsequently decided to give the land to the prior claimants, against whom it had made a binding decision; but to do so it had first

to annul the entries which had been allowed to bona fide pre-emption claimants, and who had even gone so far as to pay their money for the land they had bought.

This act of the government, which the court treats as an essential part of the defendant's title, is a stretch of power in the same direction, but of much greater reach than that of the government in the case at bar; and it is also to be marked that in the case decided it was the act of an administrative officer, while here it is the act of Congress that applies the power.

Bell vs. Hearne, (19 How., 252, 262,) says: "The Commissioner of the General Land Office exercises a general superintendance over the subordinate officers of his department, and is clothed with liberal powers of control, to be exercised for the purposes of justice and to prevent the consequences of inadvertence, irregularity, mistake, and fraud in the important and extensive operations of that officer for the disposal of the public domain."

Lewis vs. Lewis (9 Miscouri R., 183.) Each party claimed to be entitled to enter the land in question under the pre-emption laws. The register and receiver had decided in favor of the defendant, and permitted him to enter it. "The complainant thereupon filed his bill in equity for relief against the decision of the register and receiver, as being erroneous and contrary to law. It does not appear that any patent had been issued. The bill was demurred to, and demurrer sustained."

The court refused to entertain jurisdiction of the case, and for reasons state as follows (p. 188):

"Our courts entirely disclaim any right to interfere with or to control the officers of the general government in the disposal of the public domain. Such a power has not been conferred by Congress on the courts of the United States, and it would hardly have been given to the state courts. Nor could such a power, on general principles, considering the nature of our government, be considered inherent in the state courts.—(McLuny vs. Silliman, 2 Wheat., 369; McIntire vs. Wood, 7 Cranch, 504.)

Two persons, in good faith, claim a right of pre-emption to the same tract of land. The United States, the owner,

declares that he who shall establish his right, to the satisfaction of the register and receiver, shall be entitled to the land. These officers determine that one party, in preference to the other, is entitled to the right of pre-emption, and the land is given to him accordingly. On what principle can a court of law or equity interfere with this determination and grant the land to the disappointed claimant? If the courts could do this, then the right of pre-emption would be determined, not according to the judgment of the register and receiver, but in conformity to that of the courts, which would be a manifest violation of the will of the owner of the land.

But if our courts had such a power, would they interfere before the emanation of a patent? The President of the United States, being charged with the duty of seeing that the laws are faithfully executed, withholds or issues a patent, as he is advised the law requries. He is not bound, as a matter of course, to issue a patent whenever he is required so to do by the holder of the receiver's receipt; but he will look behind it, and see that the holder of the certificate is really entitled to the land for which a patent is demanded. If the state courts should interfere before a patent is issued, in what a situation would they be placed! Should this court determine to-day that the complainant was entitled to the pre-emption, might not the President to-morrow give the patent to the defendant? A court would but ill consult its own dignity in permitting itself to be placed in a situation where its judgment and decrees might be set at naught with impunity. A court should never command or direct but when it can enforce obedience to its orders and decrees. If it be said the court can afterwards, in another proceeding, compel a conveyance of the legal title, such an answer admits that the present suit is premature and unnecessary."

O'Hanlon vs. Perry, (9 Missouri Rep., 804,) was an ejectment under a state law, authorized to be brought on evidence of entry and payment, under the pre-emption law. Perry was plaintiff below, and produced the receipt of the receiver of payment of the land so entered. He entered the land under the act of 1832, on 26th No-

vember, 1839, "after the expiration of the law." The court holds that the entry was therefore "made without any authority; * * * it was issued at a time when the officers had no power or authority to issue such a certificate, and is therefore not * evidence even against a mere occupant."—(p. 809, 810.) The defendants offered to prove, on the trial, that they had applied to the register and receiver to enter the lands themselves, and had offered to prove up their pre-emption before those officers, and they again offered proof of their right of pre-emption. —(p. 806.)

The court refuse to hear such proof, and say that the court cannot entertain such questions, and the party's redress is in the land department alone. Thus, on p. 807: "Can this court, or any other court, reverse the decision of the register and receiver, and give title to the defendants, upon their making satisfactory proof of a right to pre-emption? The United States, the proprietor of these lands, have declared that the right to a preference in the purchase of their lands shall be determined by certain officers selected by them, and that such right shall be proved to the satisfaction of such officers. Will it then answer to prove it to the satisfaction of this court?

"This language of the acts of Congress granting pre-emption is obviously the result of deliberate caution, and its continued adoption, without the slightest change from 1814 up to the passage of the last law on the subject, indicates the importance attached to it by Congress. Their action on this matter seems to be the result of a conviction that the officers to whom the sale of the public domain is entrusted are as likely to do justice to claimants as the state or federal courts. At all events, as the proprietor of the land, the United States had a right to prescribe the terms upon which they would sell. Individual instances of injustice and oppression may happen under such a law, but perhaps such cases are not more likely to happen, as the law now is, than if an appeal from the decision of these officers was given the courts.

"A confirmation by act of Congress is not at all analagous to the privilege granted by a pre-emption law. The

former conveys the title of the United States as effectually as a patent. The latter professes to give no title, not even the lowest order of title, but merely a priority of right in the acquisition of title. The first is a title, the latter is a mere privilege. If the officers, whose duty it is to take cognizance of this privilege, neglect their duty, I know of no power in the state courts to compel them. Their mistakes or frauds may be corrected by the department at the seat of the federal government; and this appears to be the only correction where there is a willful or a mistaken breach of duty by the subordinate officers who conduct the sale of the public lands.—See Bell vs. Hearne, 19 How., 252, 262—*supra.*

"Where conflicting titles have emanated from the government, of course the courts must decide between them; but they cannot create a title in an individual when the United States have not given any. * * * * The court, in my opinion, did not err in refusing to permit the O'Hanlons to prove up their right of pre-emption; for the same reason, the proof of the want of certain prerequisites, among others that Perry was not a housekeeper on the land, was properly rejected.

"The officers who permitted the entry decided otherwise, and it was a question of fact for their determination."

The Supreme Court of California, in The People vs. Shearer, decided at the October term, 1866, had before it the legal effect of a law similar, in its main features, to the act of March 3d, 1863, and the question was made whether the settlers on the land had a taxable interest before their case was proved up under the law. The court hold that their mere pre-emptive privilege of purchase is not property. There is no contract between the United States and the settlers which would prevent a repeal of the law. There is simply an offer on the part of the United States to sell upon their paying the money, and the land is not subject to entry by any other person. The preference is given to the occupant when he chooses to comply with the terms. "There is no promise on the part of the United States to sell upon a promise on the

part of the occupants to pay or to purchase. * * One promise is not a consideration for another. But the United States says you may purchase the land by paying the money. There is no obligation on the part of the occupants, notwithstanding they have proved up their claim, to take the land. They may abandon it to-morrow, and refuse to pay the price. There is no obligation to take it, and the United States has no claim or demand, covenant or promise, which it can enforce against the occupants, who now have the right to purchase. * *

* There is simply an offer made on one side, with a manifestation on the other side, of a desire and intention to accept it at some future time, but as yet no actual acceptance or performance of the conditions necessary to constitute an acceptance. There is an offer to sell unrevoked, and a present right to accept, but no proprietory interest vested in the land."

"In the cases of Hastings vs. McGoogin, (27 Cal., 85,) and Page vs. Hobbs, (ib., 483,) we held that the act of Congress of March 3, 1863, authorizing certain purchasers under Vallejo to enter the lands embraced in the Soscol rancho, within one year after the filing of the surveys and plats, withdrew said lands from the operation of the general pre-emption laws, and conferred the right to purchase upon a particular class of persons, other than those who had already entered and set up claims under the general laws, thereby necessarily assuming that it was competent for Congress to thus withdraw them. The question was, in fact, made in those cases, that Congress had no power to withdraw from the operation of the general pre-emption laws those lands as to which parties had taken the preliminary steps, in pusuance of the provisions of such general law, to acquire a pre-emption right. But the court were clearly of the opinion that no property right had yet existed; that there was no contract existing between the claimant and government, and that it was competent for Congress to repeal the law granting pre-emption rights, or to withdraw any particular lands from the operation of its provisions, and no time was spent in discussing the question. To hold otherwise would be to

hold that there might be a contract without consideration, and without being mutually obligatory on the parties. Since those decisions were rendered, the Attorney General of the United States, in a carefully prepared opinion, written at the request of the Secretary of the Interior, for the guidance of his department, upon this precise point, has expressed similar views."

This case also carefully examines the decision in Lytle vs. Arkansas, and shows that there is nothing there decided inconsistent with the views above expressed.

Bower vs. Higbee, (9 Missouri, 259, 261,) says: "What is a pre-emption right? Is it any interest in the land? Is it certain that the party entitled to it will ever avail himself of it? Until he does, there is certainly no surety that he ever will acquire any right. * * A pre-emption is nothing but an offer by the government to an individual settled upon the public lands, which he may or may not accept. The circumstance that *the period has not arrived when the acceptance can be signified*, makes no difference. That he will accept, may be presumed; but still, an absolute certainty that he will accept, when the time for acceptance comes, will not confer any right, until an acceptance is actually signified *in the manner prescribed by law.*"

In Matthews vs. Zane, (7 Wheat., 164,) the party had tried first his remedy at law, and having failed there, as in Magwire vs. Tyler, had recourse to equity. But the court hold that the equitable right cannot survive the hostile action of the political power. It was held here that the passage of a subsequent law creating a new land district, *by implication* repealed the previous law authorizing a sale at a different place. It was also held that the offer by the party to enter the land, which he could not avail himself of because of the absence of the receiver, did not avail him against a subsequent entry by the adverse party. That the party got no rights which could be recognized by the court until he produced evidence thereof in conformity with the laws.

The court say distinctly it cannot look into equitable circumstances which would have entitled the party to an

entry. "Unless his entry be in itself valid," he has no standing in court.

"This court cannot take into consideration any distinct equity arising out of the contracts and transactions of the parties and *creating a new and independent* title. The validity of the plaintiff's entries depends on the land laws of the United States."

The plaintiff, on 7th February, 1804, applied to the register of the Marietta District to purchase the land. The office of receiver being then vacant, no money was paid and no entry was made; but the register took a note or memorandum of the application. "The counsel for the plaintiff insists that the title of his client commences with this application." "On the 12th of May, 1804, soon after the receiver entered on the duties of his office, Matthews paid the sum of money required by law and made an entry of the land with the register at Marietta."

But, on 26th March, 1804, between the two dates above named, the land had been entered by Zane, at the Zanesville District. The court held that the plaintiff's entry does not date from 7th February, 1804. But it also holds that his entry, complete in form, made 12th May, 1804, was not valid, because the officer who furnished that evidence of title had no authority to do so, for the reason that the land was then within a new district. On erecting the new district the court say, Congress intended thereby that the power of the officers at Marietta to sell should necessarily cease, and add: "That the effect of this construction is to suspend the sales of land in the new district until the proper officer should be appointed, does not, we think, operate against it."

* * "The case of the plaintiff may be, and probably is, a hard one. But to relieve him is not within the power of this court. We think the plaintiff is not entitled, under the laws of the United States, to the land he claims."

On the authority of this case it was held in Groom vs. Hill, (9 Missouri, 323,) that an application to a register and a deposit of money with him, in the absence of the receiver, can give no right in law or equity to the land applied for.

The court say (p. 325): "The application of Groom at the land office, his deposit of money with the register, and the memorandum made by the register of these facts, we consider entirely out of the case. Such application confers no title, either in law or equity. No sale of the land could take place in the absence of a receiver, and the action of the register in receiving the money and taking a note of the time of its receipt was entirely unofficial."

These cases fall within the reason of the rule in Lesseur vs. Price, 12 How.; Wilcox vs. Jackson, 13 Pet.; Lafayette's Heirs vs. Kenton, and other cases herein cited.

V. Proposition.

V. Proposition.

In support of the fifth proposition the following cases are cited. Most, if not all, of them were relied upon to support the opinion of Mr. Justice Wylie; but after a careful analysis of these cases, it seems that they are, without exception, authorities against his views.

Lytle vs. Arkansas, 9 How., 314. This was a writ of error to the state court. A bill in chancery was filed by Cloyes' representatives, to procure the legal title to several fractional sections of land, for which patents had been issued by the United States to the assignee of Pope, governor of Arkansas. The case applies to only one of the quarter sections, viz: N. W. fractional quarter of section 2, as plaintiff's proof failed as to the rest.

Lytle vs. Arkansas, 9 How., 314.

Plaintiff's case showed title under the pre-emption act of 29th May, 1830, as follows: He made proof on 23d April, 1831, in conformity with instructions issued on 7th February, 1831, by the commissioner, for carrying out said pre-emption law, before the register and receiver, of his settlement on the quarter section in question.—p. 316.

As the act of 29th May, 1830, would expire on 29th May, 1831, the commissioner issued instructions, authorizing settlers to make proof of their settlements and im-

provements, where the surveys had not been furnished by the surveyor general to the register, and identifying the lands as well as circumstances would admit.—pp. 316, 332, 333.

Although the surveys of the land embracing this quarter, were not perfected until December, 1833, and returned to the land office until the beginning of 1834, (p. 330,) yet the lands having been properly designated in the proof taken in support of the claim, which was made by Cloyes, as settler, on 23d April, 1831, it thus appears that the actual surveys had at that time been so advanced, as to admit of the correct designation of the land by the ascertained number.

On the affidavits of settlement made, the register and receiver, on the 28th May, 1831, before the act of 29th May, 1830, expired, issued their certificate in favor of Nathan Cloyes for this land, (p. 317,) by which certificate it was decided that Cloyes was entitled to the pre-emption right claimed.—p. 328.

Evidence by Cerificate.

As Cloyes had not been able actually to enter the land before the law of 29th May, 1830, expired, because the surveys had not been returned, on the 14th July, 1832, Congress passed an act giving to persons entitled to pre-emption under the act of 1830 one year from the time when the township plats should be returned, to enter the lands, upon the same terms required by the act of 1830, (p. 318.) This gave to Cloyes all the year 1834 to assert his claim; and within that year, on the 5th March, 1834, he procured the receiver's receipt for the money paid by him for this quarter section, (including others;) and on the receipt was indorsed the statement that it included land embraced in a location made by Governor Pope, as will be below stated.

On these facts the Supreme Court of the United States held that the decision of the register and receiver could not have been rendered in favor of the claimant, unless proof was made of settlement to their satisfaction, and that their certificate in his favor was conclusive as to the facts of settlement. The proof being entirely satisfactory under the act of 1830, there was no necessity for opening

the case and receiving additional proof under the subsequent laws. The act of 1830 having expired, all rights under it were saved by the subsequent acts. Those steps within the law which had been taken were not required to be taken again. And the court hold that the proof so taken, under the special instructions of the commissioner, was taken under the law.—p. 333.

Complete evidence of title under pre-emption laws.

It thus appears that Cloyes' pre-emption right was regular in every respect to the quarter section in dispute. His proof consisted in the certificate issued in his favor by the register and receiver, as stated in the opinion of the court, (p. 328,) which, as shown by the court on page 331, was issued under the third section of the act of 1830, and was therefore, as stated by the court on page 333, final evidence of the right under that act. This was followed up by the payment of the purchase money, under the act of 14th July, 1832, (p. 318,) to the receiving of which money no objection whatever was made. Thus, on the 5th of March, 1834, Cloyes' representatives had the full evidence required by the acts of Congress of his having entered the land in dispute under the pre-emption laws above referred to. And it may be added that under the same laws he was entitled to a patent for the land.

Patent to Gov. Pope void because on land reserved from sale.

But a patent had already been issued to Governor Pope; and the next matter to be decided by the court was; whether Cloyes' heirs had a right to obtain a decree for the legal title, thus parted with by the government.

If, on a comparison of the two titles, it should appear that the patent should have been issued to Cloyes, then the court held that a decree to that effect should be made.

It then proceeded to examine the title of Governor Pope, and decided that he had no right to enter the quarter section in controversy; because it was appropriated by the pre-emption laws before it was selected by Pope; expressing their views by referring to the case in 3 How., 666, construing said act of May, 1830, saying it appropriated the quarter section in controversy for one year; and the supplemental act of 1832 extended its ben-

efits; and it was after this extension, namely, in January, 1833, that the adverse title of Pope was located.

Thus the court explicitly decide that Pope's selection was of land reserved from sale by the prior appropriation thereof under acts of Congress.

The title of Pope is set out in the record. On page 318 are stated several acts of Congress authorizing the selection of lands for the benefit of the State of Arkansas; but the origin of the defendants' title was not the date of these acts; for they do not appropriate any specific lands, but leave such specification to be made by the agent of the state; which was not done, as stated on pp. 318 and 334, until 30th of January, 1833. Prior to that time the claim of Arkansas was undefined and unlocated; and before the location was made, as held by the court on p. 334, the land in question was reserved and appropriated by the act of 14th July, 1832.

On page 329 it appears that the bill alleges the selection of these lands by Governor Pope for the benefit of the State of Arkansas, and patents issued therefor to his assignee, William Russell, on 21st May, 1834, by mistake, and in violation of law and in fraud of the rights of Cloyes.

It appears by the bill and some of the proof offered that the plaintiffs claimed the right to enter several quarter sections in addition to the one decided on by the court.

But the supreme court, while deciding against the plaintiffs as to these other several quarter sections; and upholding the correctness of the decisions of the register and receiver in so deciding against the plaintiffs in relation thereto; use expressions which seem not to be in harmony with their own decision. They say, on page 333: "It is a well-established principle that where an individual in the prosecution of a right does everything which the law requires him to do, and he fails to obtain his right by the misconduct or neglect of a public officer, the law will protect him. * * * And subquently, when he paid the money to the receiver, * * * he could do nothing more than offer to enter

the fractions, which the register would not permit him to do. This claim of pre-emption stands before us in a light not less favorable than it would have stood if Cloyes * * * had been permitted by the land officers to do what in this respect was offered to be done. The claim of a pre-emption is not that shadowy right which by some it is considered to be." Shadowy right.

It would appear; from these comments of the court; as if it was upholding the rights of Cloyes, against which the officers had decided; and had held him possessed in law of the same rights as though they had not permitted him to have what the court holds he was entitled to. But it is not so. The officers had decided in favor of Cloyes, and had given him the evidence of his rights prescribed by the laws of Congress; and it is on that evidence alone that the court decides that he has rights. The officers, too, had decided against Cloyes as to other lands, and the court sustain them, too, in that decision. This is shown on p. 334, where the court say: "We think it (his claim) is limited to the * quarter on which his improvement was made. This construction was given to the act by the commissioner," &c.

The above comments of the court must be held to apply to the acts of the officers, who permitted Governor Pope to select the land, and to the issuing of patents to him; and the pre-emption rights held not to be shadowy are those which the government is proven to have assented to, by the documentary evidence furnished by the officers, who have been constituted its agents for the disposal of the public lands.

The principle on which this case is decided is, that a pre-emption right, evidenced by the decision of the register and receiver, and payment of the money therefor, or, in other words; established by the kind of proof required by act of Congress; must prevail in equity over a patent for the same land, void, because the land was otherwise appropriated by law; and, consequently, the acts of the officers who permitted the land to be appropriated by the patent were void, and conferred no right. The principle of the case.

Lytle vs. Arkansas, 22 How., 193.

The later case of Lytle vs. Arkansas, 22 How., 193, is a continuation of the same case reported in 9 How., 314. In 22 How., 193, the court simply decide that when the case was sent back to the State Court of Arkanas, to be further proceeded with, that the defendants might prove that the entry of Cloyes was obtained by fraud, and the imposition of false testimony on the register and receiver. (p. 203.)

The court below had heard such evidence, and decided that Cloyes' entire claim was a fraud; and that he never had settled upon or improved the land in question. The Supreme Court reviewed the evidence so introduced, and agreed with the Supreme Court of Arkansas, and affirmed its decision. Thus, the court held that the conclusiveness of the finding of the register and receiver; asserted in 9 How., 314; could not stand against actual fraud practiced on that tribunal.

In Garland vs Wynn, 20 How., 6.

In Garland vs Wynn, (20 How., 6,) Wynn proved that he had a preference of entry to the land in question. Under the act of 1838 his entry was allowed by the register and receiver; and he paid the United States for the land; so that he had the proper evidence that he was entitled to a patent. After he had thus obtained such evidence of title, Hemphill made proof before the register and receiver, that he had a right of pre-emption to the same land under the earlier act of 1830. Thus the two claims coming in conflict it was decided by the register and receiver that Hemphill had the better right; and the Commissioner of the General Land Office concurred in this decision. Whereupon the elder entry of Wynn was set aside, his purchase money refunded, a patent certificate was awarded to Hemphill, and the fee was parted with by the United States by issuing the patent to Garland, assignee of Hemphill.

Evidence.

Patent.

On this state of facts Wynn filed a bill in chancery in the state court to procure the benefit of the patent. The proof showed that by misrepresentation and fraud Hemphill had proved his settlement on the land in question, "and by which false swearing Wynn's entry was set aside." Garland insisted that the decision of the register and re-

ceiver was final and cannot be inquired into. The court put the question thus: Whether the court had power to overrule the decision that was made where the officers have been imposed upon by false testimony, "and the patent has been obtained by one having no interest secured to him in virtue of the pre-emption laws to the destruction of another's right, who had a preference of entry, which he *preferred and exhibited* in *due form*, but which right was defeated by false swearing and fraudulent contrivance brought about by him to whom the patent was awarded."

The court held that it had power to apply the rule; that fraud vitiates everything; to the judgment of this special tribunal, and hold it void because procured by the fraud of the patentee.

Cunningham vs. Ashley. 14 How., 377. A claimant, under the pre-emption laws, filed bill in chancery to obtain the title which had been patented to Ashley. The court held that Cunningham was entitled to the land under the pre-emption act of 29th May, 1830, and that the entry of the defendant was void.

Cunningham vs. Ashley, 14 How., 377.

The plaintiff made proof as to his settlement before the proper officers. The court say (p. 378): "In the record there is a list of the pre-emptions allowed at the land office * * by the register and receiver, as appears from the papers of that office. In that list the name of Cunningham stands first as having entered the south-east quarter, &c. It is certified by the register;" and, on p. 379, in the opinion, the court say: "There is, also, in the record a certificate of * * the register * at Little Rock, * * which states that Cunningham was allowed, at the land office at Batesville, a pre-emption claim," &c.; and, on p. 385, by the court, "Every legal requisite appears to have been complied with, under the act of 1830, to entitle the claimant to a pre-emption. His improvement and occupancy, under the law were clearly proved." * * * * *

Evidence.

Certificate.

"All the facts necessary to establish his right were before the register and receiver on his second application."

The court having decided the plaintiff's right to be thus

complete, passed to the examination of the defendants'. On p. 379 it appears that two pre-emption floats were allowed to be entered upon the land. The history of the title under these is given on pp. 379, 380, 381, by which it appears that the entries were made thereunder, and patents issued thereon, in consequence of a compromise of certain opposing claims.

Patents.

Here it is necessary to state that a claim on the land existed prior to that of both parties—that is "two New Madrid certificates had been laid on the quarter section, one on the 19th April, 1820, and the other the 1st of May," (p. 378.) It is stated by the court that these New Madrid locations are the reasons why the register and receiver rejected the claim of the plaintiff; for although he had entered upon the land, and under the act of 1830 established his right to enter the same, yet this prior right to the land led the officer of the Land Department to refuse to permit the plaintiff to complete his entry. (p. 383.) The court say "there can be no question that the decision of these officers was founded on the prior New Madrid locations. These were made before the complainant took possession of the land. This, under the circumstances, being an insuperable objection to the entry," &c. And, on p. 386, the court say the decision of the register and receiver was right. "No other decision could be made." Meaning that the New Madrid locations were an obstacle valid in law to the entry under the act of 1830.

New Madrid floats.

This the court state for the purpose of showing that the register and receiver found the proof of possession sufficient. If not, the court could take no jurisdiction of the case. It was entirely consistent with the existence of a bona fide pre-emption claim, that another party may have had a valid prior claim existing thereto under the mere location of a warrant under the New Madrid law, which required no settlement; so that if the New Madrid locator should take up his float, it then left the pre-emption claimant with nothing to disturb his claim.

It appears (p. 386) that "the New Madrid locations were controlled by the defendants," and that the defend-

ants kept them on the land to protect it from plaintiff's claim until after, by said compromise, they had entered their later floats on the land, and when they thus secured the land by their other title they removed their New Madrid claims.—(pp. 386, 387.)

The court thus speak of the use made of the New Madrid floats (p. 387): "But the locations of the New Madrid warrants were an obstacle then in the way of plaintiff's entry, as they had been on his first application. These locations were not in the way of defendants' floats, and it is not material to inquire by what means they were set aside. This being done, the rights of the complainant were paramount to those acquired under the new location." The defendants' new entries "were void. They were in conflict with the law and the regulation."—(pp. 388, 389.)

The second section of the act of 1830, under which these floats were issued, "declared that they should be so located as not to interfere with other settlers having a right of preference, and the circular of the land office directed that they should be restricted to unimproved and vacant lands."

Principle of the case.

This case is substantially the same as that of Lytle vs. Arkansas, (9 How.,) holding that a pre-emption right proven up before the register and receiver must prevail over a patent, void, because issued for lands reserved from appropriation under the warrant or float that was the foundation of the patent.

Barnard vs. Ashley, 18 Howard, 43.

Barnard vs. Ashley, 18 Howard, 43. Barnard filed a bill in chancery against Ashley, praying that patents issued to Ashley might be canceled. The court held that Ashley had the better title. Ashley filed a cross-bill against Barnard to guard his title against a junior patent Barnard had obtained for one quarter section, and on this the only questions of law were decided material here.

Patent to each party.

Evidence.

Barnard's patent had been obtained on proof of settlement, "which was declared sufficient by the register and receiver."—p. 49. [But their final opinion was that Barnard had no right to enter the land, but the Commissioner

of the General Land Office reversed this and ordered a patent to issue to Barnard.—p. 50. The court hold the commissioner, by the act of 1856, was authorized to review the decision of the register and receiver.]

The patent of Ashley was on an entry not allowed by law to be placed on the improvement of an actual settler.

Consequently Ashley's elder patent was for that reason void on the documentary evidence, on which Barnard's patent rested.

The court admit evidence of witnesses on the trial to prove that Barnard's pre-emption claim was falsely proved before the register and receiver, and the court on such evidence find against Barnard's title, and thus overcame the decision of the revising officer, the commissioner, and decreed for Ashley on the cross bill.

Thus the evidence of witnesses on the trial was allowed to overthrow the decision of the special tribunal. The fact proven on the trial was that Barnard's settlement was not on the quarter in dispute, but on another quarter.

The court examine the affidavits made before the register and receiver, on which the pre-emption to Barnard was awarded, and say they are so inaccurate as to be of little value, and show that a part of the same witnesses on the trial swore against Barnard. [And so the Supreme Court of the United States acquiesces in the decision of the court below, which was the Circuit Court of the United States.]

Principle of the case.

The court here on this outside evidence *annul* a pre-emption title to Barnard resting on the decision of the commissioner, but do not set up any title to Ashley on proof. They thus merely find themselves that the land was not in that condition which made defendants' entry void, and set aside Barnard's prior title based on false testimony, which cleared the pre-emption out of the way of Ashley's entry, which at once became a valid title when Barnard's was proven to be false. This case comments on and explains Lytle vs. Arkansas, 9 How.; and Wilcox vs. Jackson, 13 Pet.

To return now to the law.

Under these circumstances must the defeat of the plaintiff's efforts to procure title to these lands be put upon the ground of fraud.

Act of March 3, 1863, 12 Stat. at Large, 808, chap. 116.

There was no fraud involved in procuring the law.

Was there anything fraudulent or improper or contrary to public policy, in view of the pendency of this law before Congress and the condition of the lands as to settlers, that the Commissioner of the General Land Office should, in anticipation that it should pass, or for any other reasons of public concern, direct the surveys to be suspended and thus prevent the growth of conflicting rights.

The case at bar.

The commissioner is supposed to know the past working of the land system and the past policy of Congress, and the decisions of the courts upon the land system. Such knowledge would inform him that it was the policy of Congress to shut out conflicts during the inceptive stages of the title, and to keep itself free from all claims which it did not deliberately and by solemn act acknowledge. That until the government itself, through the means and by the agents thereto appointed, acted and furnished the *prescribed evidence* of such action, its assent was not given; and until its assent was given it was not so bound that a contract was created.

In Pollard vs. Kibbe, (14 Pet., 353,) the court so construe a special act for the relief of Pollard's heirs, as to avoid producing a conflict with a previous act which it had passed to confirm certain lots to the corporation of Mobile. Page 36, says "the act under which title was claimed was passed on 26th of May, 1824, (Land Laws, 885,) granting certain lots of ground to the city of Mobile, and to certain individuals of that city." On page 366 the court say, "but if the construction of the act of 26th May, 1824, is doubtful, * the act of 2d July, 1836, is entitled to great weight in aiding to remove that doubt. It is an act specially for the relief of Pollard's heirs. * * * They are acts in *pari materia*, and are to be construed together, and in such manner, if the language will reasonably admit of it, as to permit both acts to stand together and remain in full force.

Pollard vs. Kibbe, 14 Pet., 353.

"It is not to be presumed that Congress would grant or even simply release the right of the United States to land confessedly before granted, This would be only holding out inducements to litigation."

Fletcher vs. Peck, 6 Cr. 86.

After the decision in Fletcher vs. Peck, (6 Cranch, 86,) the motives under which the legislature passed a law cannot be inquired into by this court. So long as the government allows the law to stand unquestioned it is conclusive as a law.

Fraud in procuring act of Congress.

Mr. Justice Wylie bases his decision upon two grounds.

Two principles in the decision of the court.

I. That the pre-emption claimants by their settlement obtained a vested interest in the lands which constituted and became private property, so fixed that it was not in the power of Congress, by special law, otherwise to appropriate the land.

II. That in the procuring the passage of the law, and in endeavoring to avail himself of the title which said law gave to him, the defendant was guilty of such fraud against the vested rights of the plaintiff as to constitute himself a trustee for him.

I. Let us examine his first position in view of the decisions of the Supreme Court. He cites U. S. vs. Fitzgerald, (15 Pet., 407,) to show that no appropriation can be made of public land after a citizen has acquired the right of pre-emption. But that case decides the single question, that after the register and receiver had issued to a settler the evidences of purchase which, under the laws of Congress, entitled him to a patent, an *executive officer*, on *his own motion*, cannot reserve the land from sale. Why? The sale had the sanction of Congress, as expressed in Lesseur vs. Price, (12 How., 59, 74,) and therefore the attempted reservation by the officer was against the assent of Congress. Whereas in the case at bar, Congress by explicit laws is on the opposite side of the question. The U. S. vs. Fitzgerald is no authority to show that Congress cannot appropriate the land. There was a further feature in that case, for the Louisiana court not only found in favor of defendant, but, as in case of a cross-bill in equity, "according to the usual form of rendering judgments in such cases in Louisiana, decreed

U. S. vs. Fitzgerald, 15 Pet., 407.

that the defendants be quieted in their possession of the premises in dispute."—(p. 419.) To this peculiar decree objection was taken, because even though the reservation was void, yet the plaintiff ought to have recovered, because the United States had not parted with the fee.—(p. 420.) The court in deciding against this objection (p. 421–2.) do it, as they say, because the defect in the judgment below was on a mere technical question, for the only material point to be decided was on the power of the Secretary of the Treasury to make a valid reservation—thus: "As the United States have placed their right to recover in this case upon the *single ground* that the land was not subject to the pre-emption right of the defendants, because it had been previously appropriated for the use of the officers attached to the custom house at New Orleans, that *point being decided against* them, they ought not to prevail upon the second objection even if the judgment were technically defective."—(p. 421.)

Not reserved by act of Congress.

"It cannot be pretended that the land in controversy was reserved from sale by any act of Congress, or by order of the President, unless the direction of the Secretary of the Treasury to reserve it from sale several months after it had been actually sold and paid for could amount to such an order."

What evidence has the plaintiff in the case at bar that he is a purchaser? Before his proof was made the general pre-emption law as to this land was superseded by the special act of March 3, 1863. Therefore there was no law that authorized proof to be made that applied to this land, excepting in behalf of the Vallejo purchasers. The proof that was made therefore as to the pre-emption claimants is not made under any law, and cannot be the basis of any order that may be made, in accordance with law, of any executive officer. That proof is unauthorized and of no effect unless the principle be adopted by the executive officers of the government, and the courts, that they can base action and decrees, that shall divest the government of title, on evidence not authorized by any law to be taken; nor when taken made applicable by law to any subject. If this be the practice of the government,

Plaintiff's proof not legal.

it ceases to be a government of written laws. Not a single case can be produced in which the court has undertaken to set up a title on its own conclusions of fact from the evidence submitted to the register and receiver. That evidence is to be weighed alone by that special tribunal.

The agents of Congress are not agents of the courts.

And why? Because it is an agent of Congress, appointed under its laws, to carry out its will in exercising its constitutional duty of disposing of the public lands. Such tribunal, therefore, is a mere hand of Congress; constituted to be such; and for that reason is to judge, determine, and act, on such rules, and on such evidence; as Congress alone shall declare. It is thus palpable that the courts cannot touch these tribunals, any more than they can a committee of Congress; and that the decision of such tribunal is the decision of Congress; and so it is with the Commissioner of the General Land Office, and his appellate officer; so far as he acts as such by virtue of the declared will of Congress. They are all agents of Congress; and as such responsible, not only to the laws; but directly subject to the authority of their principal, just as any other agent continues to be subject to the superior power of the principal.

Here, then, we see why the courts have never, in any case that has been decided; excepting only the case at bar; undertaken to substitute their decision in place of the tribunal specially authorized to decide, and determine on the direct evidence of settlement before it, that it was the will and purpose of Congress that the fee simple title to land (or its declared equivalent) should pass.

Congress chooses to have this evidence submitted to *its own agent*. It has given no appeal from this tribunal to the courts, but denied it, by giving the appeal to the executive officers.

And, in West vs. Cochran, 17 How.; Willott vs. Sandford, 19 How.; Maguire vs. Tyler, 1 Black, &c., the Supreme Court have declared these acts to be those of "*sovereign*" power. Did not that term carry the meaning of of exclusive power, and thus exclude the application of judicial reasoning to the acts of Congress in such matter? In addition to the force of this selected expression, is the

very example of the courts in these cases, refusing to consider the facts according to their judicial conclusions of right, and referring the rights asserted to such sovereign power.

In the case at bar, the special tribunal was not authorized to take any testimony, except as to the possession of the Vallejo purchasers; but, without any law so directing, under instructions from the commissioner, they did hear and make report of testimony as to the entries and settlements and improvements of the general pre-emptioners. How can this court take notice of such evidence? If it is admissible in any forum, it certainly is not so here. But there is evidence here, and it is that taken under the law of 1863, to show that the defendant was in possession as prescribed in that law; for Congress itself, through its own specially authorized agent; had so decided.

The plaintiff has no evidence that this court can notice.

Under the laws as existing—that is, the act of 1863 substituted instead of the law previously applying, and the facts before the court under such law—it is apparent that it was the purpose of Congress, to sell the land in question to those who had been previously in possession of it, rather than to those who had subsequently come into possession for the purpose of availing themselves of the general pre-emption laws. Here, were two classes of settlers. Congress, by the terms of the special law of 1863, recognizes possession of this land, under the existing circumstances, as that which is meant by the common legal meaning of the word; and, in furtherance of justice, decides to make such possession the basis of the right, and, therefore, language is used which preserves to individuals the advantages of possession as it existed "at the time of said adjudication of the Supreme Court," even though their possession may not have been continued thereafter. Congress plainly shows that it did not intend that any possessions claimed under general pre-emption laws, should impair its power to otherwise dispose of the lands. The lands had never been surveyed, and it was certain, therefore, that no officer, as agent of Congress, had given the assent of the government to the act of any individual, who may have

attempted to appropriate the land, under the general pre-emption laws. The government, therefore, availed itself of the unsurveyed condition of the land; and yet it is urged that the fraud in this case lies in the fact that the surveys were suspended, in anticipation of the act of March 3d, 1863.

Now comes up the naked question of the power of Congress to dispose of these lands, under these circumstances.

The power of Congress exercised subject to the courts.

First—To deny the power is to hold that the courts can put a limit upon the *power of Congress*, when it acts directly, and without the intervention of an agent, in the disposal of the public lands.

Although the fee, which is the substance of ownership, remains in the government; and although Congress has, in express terms, revoked the powers of its special agent, who was constituted to give evidence of its assent to the purchase of the property to general pre-emptors; and has done so in and by the very same act that authorizes such agent to dispose of the land to another person, yet the courts can declare such action of Congress illegal and void; and then proceed a step further, and hold that Congress is, against its express declaration to the contrary, bound to dispose of the lands to another party.

A practical difficulty which the court meets with here is the want of evidence against the government.

The U. S. stands as a party in the court.

On p. 13 of the opinion we read: "Here, then, is the case of a party, who has entered into contract to sell a portion of his land, on certain terms and conditions to be complied with by the purchaser. The purchaser has gone on and fully complied, or offered to comply, with those terms."

Then the court will go on and render a decree against this "*party*," which is the Congress? or else the argument it uses is wasted.

It simply involves a *petitio principii*, to use this illustration. The fallacy is the more naked, because that "party who has entered into the contract to sell" is not a party to the action; and the effect of this logical mistake of the court is heightened the more by the further consideration,

that there is an utter inconsistency between the idea of a "party," as understood in the well-defined language of the law, and the Congress of the United States, exercising a "sovereign" power conferred by the Constitution. Here, then the court encounters the principle of *ultima ratio regum*. Between these sovereign powers force is the ultimate or decisive principle. Which must yield? We know that no real collision can arise here, because the Constitution; which is higher than the component parts of the government; has so divided up this sovereign power as to give exclusive disposal of the public lands to Congress, and, therefore, as to that subject-matter, makes it supreme.

The court shrinks from the idea of controlling the executive department. Thus, on p. 14: "So in the case of the government, or one of the secretaries in his official capacity, this court will not assume to control his acts by *direct interference*, but it will reach the ends of justice by injunction against the private individual, who is attempting to gain an inequitable advantage over his adversary through a decision of the government's officer."

The authorities cited do not sustain the decision made.

How in contrast is this case, with the cases cited by the court as those which show that the court will interpose to undo the acts of a special tribunal, on the grounds of fraud. In Lytle and Arkansas, 9 How., and all the cases where the courts have interfered, it is shown by the party seeking to obtain the title—first, that a patent had been issued by the government; and, next, that the party claimant had established his right before the register and receiver, and this was shown by the evidence so furnished by the register and receiver. Thus, the assent of the government, that its title should pass, was not only given, but also its title was actually passed. The court, starting with the conclusive act of the agent of Congress, evidenced only as prescribed by its rules and regulations, would then examine into the validity of the opposing title, attacked on the ground of fraud, and hear original evidence to prove that the register and receiver had rendered their decision on such fraudulent testimony. If the court so found, they would simply declare; on the grounds of fraud; that the patent so issued on the void

entry, was invalid; and by decree vest the legal title which had passed to the patentee, in the claimant. Here the government was no party, and was not interested. Its agents had performed acts on which the title was out of it; and when the entry was declared void on which the patent was issued, it was not in the power of the government to urge that the legal title was to be returned to it.

Now, to go back to the action of the court, as described in its own language, on p. 14, "it will reach the ends of justice, (not by direct interference with the officers of the government,) but by injunction against the private individual, who is attempting to gain an inequitable advantage over his adversary, through the decision of the government's officer."

Is there any false testimony that the defendant has produced? None is charged. Has he practiced fraud in procuring the act of Congress? It would seem from the remarks of the court (on pp. 12, 14) that not only the party, but that almost Congress was concerned in the moral wrong intended in getting that act, although the views of the Supreme Court in Fletcher vs. Peck, (6 Cranch, 87,) show how inadmissible any such objection is to a law; and the solicitors who framed the bill in this case do not charge any fraud in procuring the law. But, according to the reasoning of the court; the fraud consists in the defendant's availing himself of the right of purchase, given by Congress; when he secretly knew, that Congress had made a prior contract with the plaintiff to sell. But Congress negatives the existence of such contract, and the defendant is not therefore guilty of fraud in standing on the ground that Congress had made for him to stand on.

But where is the fraud? The defendant's attitude with reference to the land is to be considered. There was nothing secret in it. He had been openly and for years in possession of it, (see the general report of the register and receiver, below, and also the special report in this case, which shows that they found the very fact of defendant's possession.) The report of the register and receiver shows the notoriety that was given to the

proceedings to be taken under the act of 1863. Defendant's claim to the land, attended with unbroken possession, far ante-dates that of plaintiff. The California Land Commissioners, and the United States District Court of of that state, held his title valid in law. He claimed and was in possession under the treaty; and although the Supreme Court decided his title then not binding on the government, within the rules established by the act of 1851; yet the action of Congress, with reference to claims under the Louisiana and other treaties, showed that again and again, laws were passed to confirm claims which were held not confirmed within the terms of previous laws, enacted under treaty obligations; and that each law so passed relaxed the rules required by the previous ones; until Congress had fully satisfied its sense of justice towards all claimants. This relaxing system of laws is explicitly noticed by the learned Mr. Justice Baldwin, in Pollard vs. Kibbe, 14 Pet., 366, 378.

And amongst the many other facts on which the defendant might believe it was not a fraud in him to still cling to his lands, and press upon Congress its obligations under the treaty, was the expressed hope by the dissenting justices of the Supreme Court, that Congress would by law discharge such duty. The views of Mr. Justice Grier, (1 Black, 555, et seq.,) and Mr. Justice Wayne, (558, et seq.,) may well protect the defendant from the imputation of fraud in the prosecution of his claim before Congress; and yet the court holds that this action of the defendant, endeavoring to preserve his property (even when clothed with the sanction of Congress) was fraud, that thing hated and condemned by courts—conduct so heinous, that the legal mind can only encounter it that it may crush it.

On page 9 the court speak thus: The object of the bill "is to obtain a decree on the ground of fraud and trust, which will prohibit the defendant from obtaining from the government a patent for the land, which in equity ought to be made to himself;" and numerous cases are put on pages 9, 10, and 11, which show that the court regarded the defendant subject to its jurisdiction on the

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ground of actual fraud, consisting in so endeavoring to procure title.

After citing the authorities, the case is condensed by the court (on p. 11) by stating that the plaintiff has an *equitable title*, that defendant had notice of it at the date of the act of 3d March, 1863, and notwithstanding this the defendant has been endeavoring to procure a patent from the government.

But there is no fraud here imputed by imposing on the officers of the government. The fraud was all committed in getting the act of Congress.

But here the argument changes. Notwithstanding the fraud there was in endeavoring to procure the act, yet as it was passed, the only thing that will impede its operation is the fraudulent purpose that existed before the passage of the law. Now, the argument of the court is, that the law is invalid in its operation, and the will of Congress is not to be carried out for this reason, for this is the only application that can be made of the fraud to the enforcement of the law. What wrong is there now in the defendant's applying for his patent? The greater wrong is in the law, for the patent is only the means established by Congress for effecting the disposal of the land directed by the law. Therefore, there can be no fraud in the defendant's applying for the benefit of the law, that does not go to the root of the matter and hold the law a nullity, unless he endeavors by false testimony, or other mode, to impose upon the executive officers. This difference between this case and Lytle and Arkansas shows how inapplicable such cases are here.

On page 13, the court say that the sale to the defendant is void, because of the previous contract with the government, the attempted evasion of which constitutes the fraud. But how is the government any less involved in that misconduct than the defendant? The reasoning of the court, if inconsistent with itself, is false. It puts the case of a party who had made a contract. The question in issue is this: If it *be a contract*? It is by force of the facts as constituting a contract that the court claims jurisdiction. A contract must have mutuality. 2 Kent. Com.

(477) says: "Mutual consent is requisite to the creation of the contract; and it becomes binding when a proposition is made on one side and accepted on the other." Now there was mutual consent in this case, because it was a contract. Such is the argument of the court. The government is, therefore, involved in the same turpitude that attaches to the defendant. And the court, after using the argument of mutual contract, (on p. 13,) say: "In the case of individuals this would amount to constructive fraud, at least, on the *part of both*, and equity would forbid or annul the transaction."

The failure, however, to find the government guilty of fraud is the non-connecting link in the argument. It is an argument falsely applied; that is palpable. It is binding on individuals, but has no relevancy whatever to Congress.

It thus appears that in whatever light this argument is placed, it will not apply to the acts of Congress. An executory contract; in the legal sense in which a contract is understood in courts of justice; against the sovereign power cannot exist, for the plain reason that the sovereign never submits the question of what it is its duty to perform to any other tribunal. It reserves the right to judge of the measure, and mode of performing its duty. To consent to be sued is to admit its duty to yield to the arbiter. That is not the position of Congress with respect to the courts. If the administration of the government may be indirectly impeded, there is no limit to the encroachment of the one department on the jurisdiction of the other. No legal refinement can distinguish between the practical effect of prohibiting the grantee from accepting the evidence of title, or prohibiting the grantor from delivering it. No sale can take place without a delivery of the patent; and acceptance and delivery are parts of the same act. Thus, government sales may be stopped by denying the right of individuals to accept title, and this injunction has the effect of arresting the action of Congress in disposing of the public lands.

But the complainant's bill does not charge as fraud any of the matters relied upon by the court in its argument

to constitute the fraud. The original bill charged no fraud, and the amendment is therefore a substantial departure from the cause of action, as first stated, and was irregularly filed; but it charges fraud only in acts which preceded the passage of the act of Congress of March 3d, 1863, and which relate only to the action of the Commissioner of the General Land Office, in suspending the surveys, and refusing to allow persons to make declarations under the general pre-emption laws before the completion of the surveys.

The only act of defendant charged that connects him with these orders of the executive officers is in these words: "Your orator expressly charges that this order (to suspend the public surveys) was issued at the suggestion, and by the solicitation of the said defendant, Frisbie, on the pretext that he had made application for relief to Congress, and the said special act of March 3, 1863, was then pending as a bill before the national legislature."

The court do not see any fraud in this, for it cannot deny or restrain the commissioner's right to give such orders as he may deem proper as to the survey and disposition of the public lands, whether on suggestion of the fact that an individual was claiming them before Congress or not. Such claims were common matters, practiced from the beginning of the government to the present time, and the land department has always been administered with a practical regard to the proceedings of Congress. As no undue influence was charged as having been exerted upon the commissioner, the court could not believe that he had acted from improper motives, still less from fraud. The defendant could operate on the public surveys only through the officers of the government, and, consequently, without involving them, there could be no fraud found by the court, as alleged in the amended bill. It is thus clear that there is no charge of fraud in the bill on which to rest the conclusion of the court in its decree.

In Conard vs. Nicoll, 4 Pet., 296, the court lay down the following as a rule where fraud is charged: "If the motive and design of an act may be traced to an honest

and legitimate source, equally as to a corrupt one, the former ought to be preferred."

And, in citing and approving this rule, the court, in 6 Pet., 716, say: "This court unanimously adopted these principles as the maxim of the common law, and will be governed by them in this case, in their opinion on the question of fraud."

Aside, therefore, from the irregularities and errors of the court in finding fraud in matters not charged, and by a train of reasoning to which the government is a necessary party, in the light of a wrong-doer, it further appears that the court has entirely disregarded the above rule of the Supreme Court; and, instead of attributing a lawful motive to the defendant, has imputed a fraudulent motive to him, for the purpose of making void his title, when he has done no act in relation thereto that the court finds unlawful, excepting that consummated by the action of Congress. That is the only weak point in the defendant's position, as viewed by the court, and it calls in *presumptions* that representations were made of false facts by the defendant, in relation to the condition of the lands, and thus deceived Congress. Thus, on p. 14: "If these be *fair presumptions*, it follows that the act of 3d March, 1863, was passed in consequence of representations made by parties claiming the Soscol ranch under Vallejo's title; * that there were no pre-emption rights in existence as to the land in question with which the act could interfere. Such representations, whether made in good faith or otherwise, were not true, as we have seen, and for that deception the claimants under Vallejo are responsible."

In the original bill is this allegation: "The 3d March, 1863, at the solicitation of said defendant and other purchasers from Vallejo, Congress passed the act of that date."

Now, not only is there no charge of fraudulent intent in this part of the bill—none is to be found in any part of it—nor is it anywhere charged that it was by any one represented to Congress "that there were no pre-emption rights in existence as to the land in question with which the act could interfere." Why will the court go out of

the record for "fair presumptions" as to the representations made by the defendant and other purchasers to Congress, when they presented their memorial to Congress. Such memorial is a public document, and therefore contains all the representations that were so made, and is the only evidence? If these representations were so important as to destroy the effect of an act of Congress, certainly the court should have obtained proof of them, rather than fall into the error as to facts, which it has, by preferring the course of resorting to presumptions, and avoiding evidence.

22 How., 405, in speaking of public papers, says: "These archives are public documents, which the court has a right to consult, *even if not made formal proof* in the case." And, in 1 Wall., 721, (Romero vs. The United States,) the syllabus is, that certain archives "are public records, which this court may consult, though not put in *evidence below*." 16 Pet., 56, says: "In this country, in *all public matters*, the journals of Congress, * and also the reports which have been sanctioned and published by authority, are evidence." The court here disregarded a cardinal rule of evidence, in admitting presumptive proof of fraud; and disregarded a second rule in making a presumption where proof could be had. A presumption is a mere rule applied to supply the want of proof. But on consulting the memorial, it shows that the court has acted on facts contrary to the true ones. Not a false assertion or representation was made to Congress to induce it to pass the act of 1863. The memorialists put their claims upon the grounds of their actual bona fide possessions, attended with valuable improvements, resulting from their confidence in the validity of the Vallejo title, under the treaty with Mexico, which property, they say, is about to be "wrested from them by the recent adverse decision of the Supreme Court." In view of the facts stated in the general report of the register and receiver, as to the swarm of night-movers, who hurried on to the property to grasp improvements made by others, under pretended pre-emp-

tion settlements, it may be supposed that the memorialists made direct reference to their conduct in the above-quoted language. But what will be said in support of the presumption of the court, when we read, on page 3 of the report accompanying the bill, these words: "Up to the time of the rejection of the Soscol grant, * the settlers were undisturbed by any outside parties; but difficulties have since arisen from the entrance of parties upon the grant on the claim that it is public land, leading to collisions which must increase if Congress does not intervene. The parties so claiming have entered within the enclosures of settlers, and scenes of violence have hence resulted."

But the court say, on p. 11: "Now, it has been shown that the plaintiff possesses an *equitable* * *title* to the land in dispute, in consequence of his entry and actual settlement."

It is denied here that the complainant ever made a settlement within the meaning of the pre-emption laws. A careful examination of the acts of Congress will show that lands claimed under the treaty had never been opened for settlement under the laws; but it is not alone for such reasons—which are a sufficient objection to plaintiff's claims—that the plaintiff's rightful and legal possession is denied.

Lands may become a part of the public domain by force of the act of 1851, but they are not, therefore, made subject to sale. After lands have once been reserved by act of Congress, or by treaty, they require the authority of law and a special act of the government to place them amongst lands open for pre-emption settlement. (Wilcox vs. Jackson, 3 Pet., 498, 513.) But the principle and point intended distinctly to be urged here is, that the Vallejo claim, in its valid, lawful character, as it stood at the time of the cession of the country, *never was extinguished* by the United States. And it is contended that such claim protected and legalized the possession of the lands; that the character of the possession never changed, and was always adverse to the government, in the sense that it was intended to be the evidence of title asserted

by the occupant. Authorities need not be cited here, now, to show that possessions were legally held under the civil law by those who had not procured the final evidence of perfect title. Under the Louisiana, Florida, and Mexican treaties, it is matter of law and history, recognized by the practice of the government, that such possessions were held to be not permissive merely, but as actual proof of right. In the case of Landes vs. Brant, 10 How., 348, it is held that the claim under treaty was subject to sale by the sheriff, and that when the title was finally acknowledged by the government, it was, by relation, extended back from the time the claim was made. And, in Massey vs. Papin, 24 How., 362, the court say the imperfect Spanish title, claimed by a concession, was subject to sale and assignment, and to be mortgaged. In that case, the Spanish title had been decided *invalid* by the first board of commissioners that sat upon it, and was afterwards confirmed by express act of Congress. And the court say, (p. 364): "The government had the power to grant the land in fee, regardless of the opinion of the board."

The grant there was made to Mackay or his representatives. Mackay was dead. He had mortgaged the *claim*, and the question here was from what date the title was to be held to take effect? Was it a title of the date of the act of 1836, which was when Congress passed the title, or did that title relate back and attach to the concession so as to follow transfers thereof? The court held that its effect was to attach on to the imperfect title from the time it was first claimed, and consequently was passed by Mackay's mortgage and did not vest in his heirs.

In The U. S. vs. Arredendo, (6 Pet., 691,) the court declare the value of titles under treaty. They say, on p. 714, that the acts of the officers of the foreign absolute government are themselves evidence of their right to grant lands; and on p. 717, "the United States seem to have never claimed any part of what could be shown by legal evidence and *local law* to have been *severed* from

the royal domain before their right attached;" and on p. 736, "the United States do not come into court claiming this cession (*i. e.* the treaty) as vesting them with the whole territory in full dominion, in their sovereign capacity, with liberty to confirm previous appropriations of parts of it or not, at their pleasure; but require us to finally decide between them and the claimants, as grantees from the same grantor; which grant carries the title to the land." And again, on p. 713, "where Congress have, by confirming the reports of commissioners or other tribunals, sanctioned the rules and principles on which they were founded, it is a legislative affirmance of the construction put by these tribunals on the laws conferring the authority and prescribing the rules by which it should be executed. * * It is a legislative ratification of the act done," &c. And, by Marshall, Ch. J., (in Delassus vs. U. S., 9 Pet., 117, 133,) "the sovereign who acquires an inhabited country acquires full dominion over it; but this dominion is never supposed to divest the vested rights of individuals to property."

In Sparrow vs. Strong, (3 Wall., 97, 104,) was involved the very matter of the legal principle in possession of land acquired under this same treaty with Mexico, where the title had not passed out of the government. On p. 101: "In this case the *possession* is one amounting in *strict law* to a trespass; at best to a tenancy at will of the government." This objection the court dispose of on the ground that the right under the treaty is such that so long as it is undisturbed by the government has its *implied sanction*, and therefore the possession is a strictly legal one in the mind of the court. Thus, p. 103: "It is insisted that the matter in dispute is a mining claim; that the land where the mine exists has never been surveyed and brought into market, and that consequently there can be no mining right to such land in any person, capable of being estimated in money." On p. 104: "The territory of which Nevada is a part was acquired by a treaty. Rights and titles acquired under ceding governments remain unim-

Point by Counsel.

paired under our government. * * * * We cannot dismiss this writ of error on the ground that a controversy concerning the possessory right to a mining claim, existing under the express sanction of the territorial legislature, and the implied sanction of the national governernment, does not relate to a subject-matter capable of being valued in money." And in Bush vs. Marshall, 6 How., 284, 288, the court by implication treats as legal a possession of a kindred nature, on the grounds of the custom of the country, saying—"These possessions and improvements were treated as valid and subsisting titles by the settlers, and were the subjects of contract and sale by conveyances in the forms usual for passing a title in fee." And the law here in question recognizes the Vallejo sales as valid transfers of an interest in the land.

It needs no further elaboration to show that the possession of the claimants under the treaty, of the Vallejo grant, was not only actual but strictly legal. Such possession was recognized as valid and rightful by the local law of California. Now the act of 1851 did not in any way invalidate such possession, and the failure of the claimants in procuring a final decision in their favor, only left them in the same condition they were in before the law was passed, and that was subject to be dealt with as Congress should direct. But one great question was before the Supreme Court on which the case turned, and that was the "want of power in the governor to make" the grant.—U. S. vs. Vallejo, 1 Black, 541, 550.

And, on page 557, the discussion of Mr. Justice Grier is as to the same question, who says: "But we are about to forfeit the title, on the ground that the governor * had no authority to sell" the land. He then proceeds to show that the governor had authority, and says, (p. 557,) "*Possession has followed in* pursuance of it;" and Mr. Justice Wayne says, on p. 561: "The grantee *was in possession, open and notorious*, for three years, undisturbed, prior to the occupation of this country." Here, then, was a divided tribunal, authorized by Congress to decide against

the government, and its decision being in favor of the government, within the rules prescribed by the act of 1851, the claimants appeal direct to Congress and ask for a further hearing of their *same claims.* As to this see the memorial, which urges old grounds and not new, making prominent the treaty rights, the possession thereunder, and the views of such rights taken by the minority of the Supreme Court. Next see the report No. 95, in the 37th Congress, in the Senate, to accompany Senate bill 537, where it appears that on presenting the matter to Congress the committee go over all the facts and lay much stress upon the possession of the property and the views of Judges Grier and Wayne. The law passed on this report is to be considered a legislative adoption of its views, and as sanctioning the possession held under the claim. The report, p. 2, says: "From that time Vallejo had the exclusive and undisputed use and *possession* of the ranch. * * Thus matters stood when California became a part of the Union, by a treaty guaranteeing protection to the property of Mexican citizens."

On these facts, and the law as thus settled, as the government not only never actually interfered with the possession of the Vallejo claimants, but, by the terms of the law of 1863, evidently had such possession in view as the most prominent feature of the case, and finally stamped such possession as lawful, it is therefore contended that the entry of persons against the Vallejo purchasers was never a legal or accomplished possession.

The claimants, under the treaty, were the actual tenants of the land under permission of the government, and they never ceased to be such. The entry of the plaintiff was not on vacant lands; it was not with the consent of the party in possession; it was not in conformity to the rights of such party; it was not obtained from the government; it has never been sanctioned by the government. Both the tenant occupying the land and Congress, under whom he occupied, have always denied that any rights such as

attach to possession have accrued from the intrusion of the plaintiff.

The representations as to the condition of the ranch, made to Congress by the claimants, when applying for the special act of 1863, is confirmed by the following extracts from said general report made by the register and receiver, on the 2d of January, 1865, and which was a necessary part of the facts to be considered by the court, in making up its conclusion as to the equity of the plaintiff, but which evidently has been overlooked by the court. These facts, furnished by the government officers, are shown by the following psssages from said official report to the commissioner.

The trial of these cases has occupied the register and receiver constantly every working day, as well as evenings, for nearly eight months, during which time between two and three thousand witnesses have been sworn and examined, and their testimony reduced to writing; and between four and five thousand deeds, documents, affidavits, and the like, introduced and examined.

At these trials, in accordance with your instructions, each party had the amplest oportunity of cross-questioning the witnesses of the other, and of objecting to, and making arguments upon the admissibility, relevancy, and competency of all classes of testimony presented to the tribunal.

These privileges were taken advantage of to an almost unlimited extent; cross-examination of a single witness consuming, in many instances, several hours.

The same liberal course was adopted in respect to the number of witnesses. We permitted parties to produce additional witnesses on each side, as long as they desired to do so, without check or hindrance, understanding it to be your desire to probe the entire subject-matter to the very bottom, if possible.

No case was closed as to testimony, so long as either party claimed that they had other witnesses, or additional evidence bearing upon the controversy, which they desired to produce.

We have, therefore, to report that the possession that General Vallejo had of "Soscol," in 1846, was the usual use and possession of the time and the country, and that it was the best and most perfect use and occupation of which the land was capable.

The rancho was therefore reduced to possession by General Vallejo before the Americans took possesson of the country.

Soon after the American occupation or conquest, General Vallejo began to sell off portions of the "Soscol," and continued this practice until about the year 1855, at which time he sold the last of it, and does not appear to have had, or claimed any interest since.

This sale and consequent dividing the land into smaller parcels produced its usual effect in the way of improvements.

From 1855 to 1860 the "Rancho of Soscol" was almost entirely reduced to absolute and actual possession and control by his vendees, being by them fenced up into fields, surrounded by substantial enclosures, and improved with expensive farm-houses, out-buildings, orchards, and the like, and was cultivated to grain wherever suitable for that purpose.

It had upon it two cities of considerable importance, viz: Benicia and Vallejo, each of which had been at one time the capital of the State of California.

No rural district of California was more highly improved than this, and but a very small portion equal to it.

The title to "Soscol," before its rejection by the United States Supreme Court, was considered the very best in California. All the really valuable agricultural land in California was held under Mexican grants, and as a consequence, all had to pass the ordeal of the land commission.

From 1853 to about 1860 very few had been finally passed upon by the courts, so that during that time the question for the farmer to decide was not what title is perfect, but what title is most likely to prove so by the final judgment of the Supreme Court.

Amongst the very best, in the opinion of the public, stood "Soscol."

One conclusive, unanswerable proof of that fact is this, that there was not a single settler on the grant at the time it was rejected. Not one person on it except in subordination to the Vallejo title. Every resident on the whole tract held his land by purchase from Vallejo, or his assigns, and held just precisely the land so purchased, and not one acre more or less. This fact was not even disputed during the whole eight months of investigation through which we have just passed. It is a notorious fact that of the grants in California which have stood the test of the Supreme Court, very many have been entirely in the possession of squatters, and all with more or less of such possessions, and the final patent has alone succeeded in recovering the long lost possession to the grant holder. There were no settlers on the "Soscol." The people had the most perfect confidence in the title. It had been twice confirmed by tribunals of high authority and great learning—first by the United States Land Commissioners, and then by the District Court of the United States.

It only wanted the final confirmation by the Supreme Court, and none doubted that it would follow of course. Business could not and would not await the nine years consumed in adjudicating this title. Farmers were obliged to have lands and they bought them. Capital must and would seek investment and it was lent on mortgage. When all titles required the same confirmatory decree the citizen could not discriminate, but exercised his best judgment.

The sales of lands upon the "Soscol" were made at prices which called for perfect title; they brought the full improved

value of the land. Money was lent on mortgage in the same way.

The deeds and mortgages which accompany the respective cases are the very best evidence of the opinion the public entertained of the character of the Soscol grant title. The people were amazed when it was announced that the Soscol grant had been rejected.

No fact developed by this examination has appeared so surprising to the minds of the register and receiver as that there were no pre-emption settlers on the "Soscol." This is so unusual in California that we expected to find the contrary. There was no possession on the tract adverse to the grant title.

Thus stood matters until early in the year 1862, when the intelligence reached California that the grant had been rejected by the Supreme Court. The struggle soon began. There was, at the time, employed upon the United States Navy Yard at Mare Island, and also upon the Pacific Mail Company's works at Benicia, a large number of mechanics and laborers. There was also in the towns of Benicia and Vallejo a large floating population. Tempted by the great value of these lands, in their highly improved state, many of these persons squatted upon the rancho.

The land holders in possession resisted.

The houses of the great majority of the settlers were erected in the night time, as it was necessary to enter the enclosed fields by stealth. These houses were built of rough red wood boards set up edgewise, with shed roof, and without window, fire-place, or floor.

They were about eight feet square, sometimes eight by ten feet, and never over six feet high.

We have no hesitation in saying that they were utterly unfit for the habitation of human beings, and, further, that they were never designed for permanent residences. The mode of erecting these shanties was as follows: The planks were sawed the right length in the town of Vallejo or Benicia, in the afternoon of the day, and at nightfall were loaded upon a cart. About 11 o'clock at night the team would start for the intended settlement, reaching there about one or two o'clock in the morning. Between that hour and daylight the house would be erected and finished. Sometimes the house would be put together with nails, but when too near the residence of the land holder in possession, screws would be used to prevent the sound of the hammer attracting attention. Very few of this class of settlers remained upon their claims above a few days, but soon returned to their ordinary occupations in the towns.

Generally, after they would leave, the land holders would remove the shanty from the ground. In some cases they would pull them down with force immediately upon discovering them, and in the presence of the settlers.

A few of them got settlements near enough to their places of employment to enable them to work in town or at the Navy Yard, and to sleep in their shanties—some regularly others only

occasionally. These generally remained longer than the others, but none of this class have remained up to the time of the trial.

None of the settlers who went on since the grant was rejected have attempted regular improvements or cultivation. A few have harvested the grain planted by the land holders; as it grew on their ¼ they would harvest it, and offer this as evidence of good faith and cultivation.

We have no hesitation in pronouncing, from the evidence, that these are not settlers within the spirit of the pre-emption laws, but are mere speculators, desirous of getting the improvements of another to sell and to make money.

Notwithstanding these facts, we find the court so unacquainted with the contents of these public records, made exclusively with reference to this case, as to possess views thus expressed, (p. 12): "We have seen an act of Congress, passed for the benefit of this defendant, the effect of which would be to deprive the plaintiff of *his property*, and sell it to the defendant for a dollar and a quarter an acre." And, again, on p. 11: "Now, *it has been shown* that the complainant possesses an *equitable* inchoate title to the land in dispute, in consequence of his entry and actual settlement, and improvements made thereon."

It is urged that these opinions are, as in case of those as to the fraud of the defendant, rather the result of presumptions than of the evidence which belongs to and makes up this case.

M. BLAIR,
F. A. DICK,
Of Counsel for the Defendant.

JANUARY, 1867.

IN THE

Supreme Court of the United States.

No. 298.—DECEMBER TERM, 1868.

JOHN B. FRISBIE, *Appellant*,

vs.

L. H. WHITNEY, *Respondent*.

Brief for Appellant.

M. BLAIR,
F. A. DICK,
Solicitors for Plaintiff in Error.

J. L. Pearson, Printer, corner 9th and D streets.

IN THE

Supreme Court of the United States.

No. 298.—December Term, 1868.

JOHN B. FRISBIE, *Appellant*,

vs.

L. H. WHITNEY, *Respondent*.

Brief for Appellant.

Statement of the Case.

Both parties are citizens of California, and this suit is in equity in the Supreme Court of the District of Columbia to divest Frisbie, the appellant, of the legal title to land in the State of California, which was granted to him by patent, (page 79,) dated 9th April, 1867, and while this suit was pending.

After this patent was issued, on 4th December, 1867, the second amended bill was filed, in which it was charged "that the said patent has been unjustly, illegally, and fraudulently obtained, under the circumstances fully stated in the said original and amended bills, as heretofore filed in this case, and the complainant, *claiming to be entitled in equity to enter* the said land as a pre-emptioner, as stated in his said original bill, now prays that the defendant may be held a trustee," and ordered to convey the land on payment of the price put on it by Congress.—(page 87.)

The original bill contains no charge of fraud, but merely alleges that the plaintiff could have completed his title under the general pre-emption laws, but for the

fact that, under the special act of March 3, 1863, the Land Department held that he was not entitled so to do.—(pp. 1–3.)

In the amended bill it is charged that the commissioner of the land office, before the passage of the act of Congress under which defendant claims, stopped the completion of survey of the lands, and issued orders not to allow pre-emptioners to enter the lands; and then follows this charge: "Your orator expressly charges that this order was issued at the suggestion, and by the solicitation of, the defendant, Frisbie, on the pretext that he had made application for relief to Congress, and the said act of March 3, 1863, was then pending as a bill; and in pursuance of these unjust and oppressive proceedings," the commissioner issued the said orders. "Thus, by the fraudulent and unjust management of the defendant, your orator was prevented from proving his pre-emption until after the passage of the special act aforesaid."—(page 8.)

The original bill was filed July 21, 1866, and the first amended bill on 30th same month, both asking for an injunction to restrain the defendant from receiving patent under the act of March 3, 1863.

The injunction was granted the 16th August, 1866, (p. 16,) and on February 16, 1867, it was modified, so as not to restrain the defendant from receiving the patent from the government, (p. 77,) and on June 6, 1868, decree was rendered declaring defendaat to be a trustee for Whitney.—(p. 106.)

No evidence of fraud, or of any attempt to influence the officers of the Land Department, is found in the record, nor was any offered.

The defendant fully and explicitly denies all allegations of fraud and wrongful actions charged in the first amended bill.—(p. 29.)

This is all of the case as stated in the pleadings, as it exists between the plaintiff, Whitney, and defendant,

Frisbie; and as this is a chancery suit based upon the ground of fraud, as above shown, it should, by rules of chancery proceedings, be considered as ending here.

No evidence should be received or considered, excepting in support of the issues made in the pleadings.

The plaintiff's case beyond this is against the United States, and the grounds upon which the decree is made are, that the United States had no power to grant this land to Frisbie, and was at liberty to grant it only to Whitney, and that a court of equity can go behind and revoke the deliberate act of Congress, when in granting its lands the principles of equity are not fully carried out by Congress. This limits the power of Congress over the disposition of the public lands, and asserts the power of the Supreme Court of the District of Columbia over lands in California in opposition to that of Congress.

This is a constitutional question. Article IV., section 3, of the Constitution of the United States provides, "Congress shall have power to dispose of, and make all needful rules and regulations respecting, the territory or other property belonging to the United States."

The patent to the defendant, Frisbie, does dispose of this land.

It is charged in the pleadings that this patent is made by virtue of an act of Congress of March 3, 1863, and the whole case admits that all the title, legal and equitable, which Congress could "dispose of" on that day is vested in Frisbie, without any claim thereon, excepting such as the plaintiff had on the 3d of March, 1863, under the laws of Congress, as a settler upon the lands under the general pre-emption laws.

Two questions arise here:

I. May Congress, at any time before the title has passed from the United States, dispose of the territory or other property belonging to the United States absolutely?

II. If it has not this power absolutely, has it lost such

power by virtue of any facts established by the evidence offered by the plaintiff?

I. It is insisted for the defendant that this power of Congress is intended by the Constitution to be absolute, and that it is not divided between Congress and the judiciary.

The following citation of cases are referred to as more fully set out in an enlarged printed argument filed in this cause.

Burgess vs. Gray, 16 How., 48–65. (Pr. Arg. 13.)
Berthold vs. McDonald, 22 How., 334–341. (Pr. Arg. 13.)
Landes vs. Brant, 10 How., 348–370. (Pr. Arg. 6.)
Menard vs. Massey, 8 How., 293. (Pr. Arg. 6.)
Wilcox vs. Jackson, 13 Pet., 498. (Pr. Arg. 6.)
Bagwell vs. Broderick, 13 Pet., 436–448. (Pr. Arg. 12.)
Lafayette's Heirs vs. Kenton, 18 How., 197. (Pr. Arg. 16.)
Doe vs. Braden, 16 How., 636–657. (Pr. Arg. 18–25.)
Foster vs. Neilson, 2 Pet., 253, 307, 309. (Pr. Arg. 18.)
Garcia vs. Lee, 12 Pet., 511–520. (Pr. Arg. 18.)
Matthews vs. Zane, 7 Wheat., 164. (Pr. Arg. 37.)
Foley vs. Harrison, 15 How., 433. (Pr. Arg. 27.)
Lesseur vs. Price, 12 How., 59. (Pr. Arg. 11.)
Rector vs. Ashley, 6 Wall., 142.

II. It is insisted by the defendant that, if this absolute power may be diminished before being entirely parted with, that it can only be by the written act of some agent thereto specially authorized by law in force at the time the writing is executed, and which writing it is also made the duty of such agent to execute as evidence of disposal of the public territory. No other than such written evidence is admissible.

Lesseur vs. Price, 12 How, 59–74. (Pr. Arg. 10.)
Rector vs. Ashley, 6 Wall, 142–149.
Burgess vs. Gray, 16 How., 48–65. (Pr. Arg. 13.)
Landes vs. Brant, 10 How., 348–370. (Pr. Arg. 6.)

Hale vs. Gaines, 22 How., 144. (Pr. Arg. 14.)
West vs. Cochran, 17 How., 403. (Pr. Arg. 19.)
Matthews vs. Zane, 7 Wheat., 164. (Pr. Arg. 37.)
Kissell vs. Schools, 18 How., 25. (Pr. Arg. .)
Lytle vs. Arkansas, 9 How., 314. (Pr. Arg. 39.)
Lytle vs. Arkansas, 22 How., 193. (Pr. Arg. 44.)
Garland vs. Wynn, 20 How., 6. (Pr. Arg. 44.)
Cunningham vs. Ashley, 14 How., 377. (Pr. Arg. 45.)
Hastings vs. McGoogin, 27 Cal., 85. (Pr. Arg. 36.)
Bower vs. Higbee, 9 Mo., 259. (Pr. Arg. 37.)
Hutton vs. Frisbie, Cal. Rep., filed herewith.
Barnard vs. Ashley, 18 How., 43. (Pr. Arg. 47.)
Ohanlon vs. Perry, 9 Mo., 804. (Pr. Arg. 33.)

Most of these cases cited were in equity, and it was invariably held that, where the plaintiff had no evidence of his being a purchaser, such as is furnished by written acts of agents of the government authorized by law, he had no standing in any court. That was a necessary foundation for a suit in equity.

Next it was held in all such cases, that if the asserted equitable claim was one which Congress had chosen to pass over, and, in opposition to it, had given the land to another party, that act was conclusive upon the courts.

Under every one of the Arkansas cases, the plaintiff stood in court with written evidence that the register and receiver had allowed him to enter the lands. This, of course, entitled the purchaser to a patent, and the court then had jurisdiction to inquire whether the defendant's patent was properly issued.

In the case at bar, Whitney never succeeded in making an entry of the land under the pre-emption laws; which laws were repealed by the act of 1863, as to this land.—(Ohanlon vs. Perry, 9 Mo. Rep., 804. Pr.Arg. 33.)

This is the very ground upon which he brings the suit, charging that the defendant's wrongful conduct resulted in defeating the plaintiff in completing his entry of the

land. Thus, he alleges that before the passage of the act of March 3, 1863, the surveys of the land were completed, but that the surveyor-general was prevented from returning the plats to the land office by the orders of the commissioner; also, that the commissioner ordered the officers of the land office in San Francisco not to permit the declaratory statement to be filed with reference to the lands, and all which acts were fraudulently procured to be done by the defendant; also, that he was by same orders prevented from making his proofs before the act of March 3, 1863, was passed, and he adds, "Thus, by the fraudulent and unjust management of the defendant, your orator was prevented from proving his pre-emption until after the passage of the special act aforesaid."—(Page 8.)

And in his third bill filed, he says he claims "to be *entitled in equity* to enter the said land as a pre-emptioner."—(Page 87 of Record.)

His proof, therefore, is admissible only to show that he was *in equity* entitled to enter the land.

This proof consists, first, in the certificate and finding of facts in relation to the claim of Frisbie and of Whitney to this land made by the register and receiver under the act of March 3, 1863, and the instructions of the commissioner, (p. 44 of Record,) by which it appears that the land was settled upon, improved, enclosed, and reduced to possession by the defendant, Frisbie, "wherefore we do award said land" to said Frisbie—and that Whitney has resided on the land, and put up a valuable and permanent improvement and there resided with his family. "Wherefore his claim thereto is hereby rejected upon the ground that the land was *not open for settlement*, and has been withdrawn by the special act of March 3, 1863."—(p. 44.)

The plaintiff, when moving on his bill for an injunction, filed as an exhibit only a part of this document, leaving out the first part, which showed that the proof gave the land to Frisbie.—(pp. 11 and 100.)

The plaintiff read the orders by telegram and letter, sent by the commissioner to the register and receiver, and surveyor-general, in San Francisco.—(pp. 64, 65, and 100.)

Also filed notes of survey.—(pp. 65 and 100.)

Also the patent to Frisbie. —(pp. 78, 101.)

Objection was made to this by defendant, and also to the depositions taken before Commissioner Brown in Washington.—(pp. 86 and 100.)

These depositions were of witnesses taken before a commissioner of this court to prove settlement on the land by the plaintiff, and other acts which would be evidence of a right to enter, properly admissible before the register and receiver.

Also read the letter of July 18, 1866, by Secretary Harlan to the commissioner, showing that, at the request of Whitney's counsel, the department had suspended executing the act of 1863 until Congress should act on a petition of the pre-emption claimants, and that Congress had acted and refused to change the law.

Plaintiff's proof shows that he never did have any right in law to enter the land.

The defendant gave in evidence the proceedings of the register and receiver under the act of March 3, 1863, showing how fully and fairly all facts touching possession had been inquired into, and also the finding of the register and receiver in favor of Frisbie, and against Whitney, as to the matter of their contested possession.—(pp. 35, 44, 101.) This document shows that, when Whitney went on the land it was "fenced in, improved, and in the actual possession of, and under cultivation by, the defendant."—(pp. 44, 45.)

The facts, therefore, show that Whitney did not go upon land which was vacant, but, on the contrary, that which was held bona fide by the defendant, and which, under the pre-emption laws, no other person was entitled to enter upon.—(See report of register and receiver in full, pp. 35–43, 101.)

The memorial to Congress, on which the act of March 3, 1863, by occupants of the Soscol rancho, under the Mexican government, was also read in evidence by the defendant.—(pp. 32, 101.)

On page 100 will be found the minutes of the court, stating what evidence was read, and what rulings made on exceptions to evidence at the hearing; and on pages 86 and 100 are exceptions of defendant to evidence.

The defendant also read in evidence the transcript of another suit for the same land, pending in the California state court, between the same parties, involving the right to the possession and title to the same land, which was begun before this action.—(pp. 91 and 101.) The answer to the second amended bill, which sets out this record as a bar, is on page 89.

In support of this defence see—

Peck vs. Jenness, 7 How., 612. (Pr. Arg. 12.)
Randall vs. Howard, 2 Black., 589.
Gaines vs. Nicholson, 9 How., 356. (Pr. Arg. 14.)
Smith vs. McIvor, 9 Wheat., 532. (Pr. Arg. 14.)
1727 Dan. Ch. Practice, in note, (ed. of 1865.)
8 Calif. Rep., 26, 24, 34, 66.
9 Calif. Rep., 77, 607.
5 Sandf., 612; 24 Barb., 154, 160.

The plaintiff, under the pre-emption act of 1841, to be entitled to enter public land, must prove certain facts to the satisfaction of the register and receiver.

The proof, in this case, showed that the register and receiver were satisfied that, in consequence of Frisbie's possession, "the land was not open for settlement."—(pp. 45, 12.) This is plaintiff's proof, and should end his case.

The plaintiff is without the evidence of a grant that is authorized to be given by the law that he claims under. His pre-emption right is founded alone on the will of Congress, and cannot be established otherwise than as

prescribed by law. Congress does not give up the power over the public lands until its own agents have executed its laws, and they can be executed only as they direct, that is, by the agents appointed by the laws to execute them, and not by any other agents or power. If another agent may execute the laws than him provided for, then there is forced upon Congress an agency it has not contemplated. To put a different executive officer in power to execute the law from him named by the law is to change the law. If this power exists, to what extent may it be exercised. Every pre-emption law provides that the proof in relation to settlement shall be taken by the register and receiver. They thus are made special commissioners for this purpose, and are to act within their district. And then their experienced judgment is to be given on the facts. Under certain circumstances they may be in doubt as to the facts, and if so must have the doubts removed before they can award the certificate to the claimant. They may, under suspicious circumstances, think it proper to give notice to an adverse claimant of the land, of what witnesses have been examined, and thus lead to a full investigation before deciding. Local presence, and that knowledge acquired only by one constantly in the land office, may be, and constantly is, necessary to the correct administration of the land laws. It is easy to multiply reasons why Congress should have these local questions decided by an agent at the place, whose experience and local information fit him for the duties. But in the case at bar the witnesses have been examined in Washington city, by one not an agent of Congress, but by one delegated by the Supreme Court of the District of Columbia. Here is an oral examination reported in writing to another tribunal, this honorable Court, that this Court may, by evidence not authorized by any law to be taken, determine questions expressly submitted to a local tribunal in California. But again, under the acts of Con-

gress there is an appeal from the decision of the register and receiver to the experienced judgment of the Commissioner of the General Land Office, whose importance and powers as the executive officer of Congress is thus described by the Supreme Court in Bell v. Hearne, (19 How., 252, 262): "The Commissioner of the General Land Office exercises a general superintendence over the subordinate officers of his department, and is clothed with liberal powers of control, to be exercised for the purposes of justice and to prevent the consequences of inadvertence, irregularity, mistake and fraud in the important and extensive operations of that officer for the disposal of the public domain."

The act of 4 Sep., 1841, 5 Stat., 455, is that relied upon by plaintiff as conferring his rights of pre-emption. The 12th section of this law says: "Prior to any entries being made under and by virtue of the provisions of this act, proof of the settlement and improvement thereby required shall be made to the satisfaction of the register and receiver of the land district in which such lands may lie, agreeably to such rules as shall be prescribed by the Secretary of the Treasury;" and the 11th section says, "all questions as to the right of pre-emption arising between different settlers shall be settled by the register and receiver of the district within which the land is situated, subject to an appeal to and a revision by the Secretary of the Treasury."

From the whole case it appears that the defendant has acquired a title to the land in question, not contrary to or by evasion of the act of March 3, 1863, but under and based upon that law; there is, therefore, no reason for setting aside the patent which does not equally apply to setting aside the law. Whatever of meritorious ground for claiming the title the defendant had has been passed upon by Congress, which has accepted the defendant's money, and for reasons deemed by it sufficient, made the defendant a special grantee. The defendant has not taken

any advantage of the plaintiff; has not used plaintiff's money, nor claimed to come in under any settlement made by plaintiff; has not attempted to appropriate any benefit due to plaintiff on account of his entry, cultivation, or improvement; has never stood in the light of his agent or representative, has not even stood by, tacitly consenting to plaintiff's expending his money and labor on the land; on the contrary, his attitude has been always what it now is. Both parties admit the title of the government, and therefore they have a common point of starting. Neither claims otherwise than under law of Congress. The defendant has the evidence of a grant from Congress, regular in all respects, given openly and upon the fullest and most mature consideration of every objection which could be urged against it, by the executive officers of the government, and by Congress itself, as appears by the letter of the Secretary of the Interior to the commissioner, dated July 18, 1866. This bill should have been dismissed for want of jurisdiction, as no fraud was proven and no other grounds of trust alleged.—(Massie vs. Watts, 6 Cranch, 148, and other authorities cited by Judge Wylie, pages 23, 24 of Record.)

M. BLAIR,
F. A. DICK,
Solicitors for Plaintiff in Error.

Supreme Court of the United States.

LEVI H. WHITNEY,
RESPONDENT,
vs.
JOHN B. FRISBIE,
APPELLANT.
} No. 298.

BRIEF.

This action was brought on the 21st of July, 1866, in the supreme court of the District of Columbia.

The land out of which this action grew is part of what was claimed to be a large Mexican grant—the "Suscol rancho"—in the State of California. The defendant having obtained the legal title, complainant seeks to compel a transfer or assignment thereof to him, on the ground that he "had a prior valid equitable claim under the pre-emption act of September 4, 1841," and subsequent acts.

The grant was examined by the land commission appointed under the act of March 3, 1851, and by the district court of the United States for the northern district of California, and allowed. On the 24th of March, 1862, the Supreme Court of the United States finally decided the grant to be null and void. The act of 1851 referred to declared that when such claims should be rejected the lands embraced therein should "be deemed, held, and considered as part of the public domain of the United States. The act of March 3, 1853, made all public lands in California, whether surveyed or unsurveyed, subject to the provisions of the act of September 4, 1841. On the 30th of May, 1862, and on the 2d June, 1862, following the rejection of this grant by the Supreme Court, Congress passed other acts, extending the pre-emption system to such lands, and providing for their survey thereafter. A survey of this rancho was begun, and on the 13th of October, 1862, the survey of the township in which the quarter in question is situated was returned to the surveyor general's office.

On the 28th of October, 1862, the plaintiff in this action entered upon the quarter and proceeded with proper dili-

gence to put up buildings, and thereafter cultivated a portion of the land as soon as possible, and in due time made offer to do all things necessary to entitle him to a patent.

March 3, 1863, Congress passed a special act allowing purchasers from Vallejo—the original claimant of the grant—to enter such of the "Suscol" lands as they had reduced to possession and settled upon at the time of the adjudication of the Supreme Court, March 24, 1862.

The defendant is a son-in-law of Vallejo's, and claims under him, by conveyance made in 1855.

Plaintiff's claim of pre-emption right was rejected by the Land Office, on the ground that the land had been withdrawn from the operation of the pre-emption laws by the act of March 3, 1863; and under that act defendant was allowed to enter and receive a patent for the land. Plaintiff claims that defendant having knowledge of his claim, as shown by the record, should be decreed to make him a deed, upon payment of one dollar and twenty-five cents per acre, and so the supreme court of the District decided.

Both plaintiff and defendant are and were at the bringing of this action citizens of the State of California.

For this reason, and because the land in controversy is situated in California, and because of certain suits pending in the State courts in California, it is insisted that the supreme court of the District of Columbia had no jurisdiction of the case.

Many exceptions were taken and objections made during the pending action in the court below, but as no regular bill of exceptions or assignment of errors appear in the record, I presume it only necessary to discuss the case on its merits, with the question of jurisdiction.

I claim that the quarter in question was a part of the public domain at the date of plaintiff's entry thereon; that by his entry and subsequent acts he acquired a property in the land, and that having done so, it was his as any other property belonging to him, and that Congress could not deprive him of it while he was offering to perfect his title by a compliance with the laws under which he made his entry and settlement.

And I further claim that defendant's acts in the premises, he having full knowledge of plaintiff's equities, amount to constructive fraud at least; that he, therefore, holds the legal title in trust for plaintiff. And further, that defendant being guilty of constructive if not actual fraud, and holding in trust for plaintiff, the action is one of purely a personal nature, and jurisdiction therefore attaches wherever

personal service of process may be made. In fact, that jurisdiction of the person is all that is necessary to give jurisdiction over the subject of the action.

This is not an action to try the title to, or right of possession to, property in California. Plaintiff was in possession claiming as a pre-emptor, and alleges that defendant was awarded a patent over his claim, which was superior and better, being prior and lawful. That defendant took the patent in trust, and that he obtained it by fraudulent means. Both the question of fraud and trust are personal, and are subjects for the jurisdiction of any court of equity where the defendant may be personally served with original process. (See Massie *vs.* Watts, 6 Cranch, 148.) Penn. *vs.* Ld. Baltimore, 1 Ves., Sr. 444, is directly in point.

Justice Wylie says: "And on this subject it will make no difference whether the defendant be actually domiciled here, or is here only temporarily. In Archer *vs.* Preston, cited by Lord Nottingham and Lord Keeper Guilford, in the case of Earl of Arglasse *vs.* Muschop, 1 Vun., 77, 135, a decree was made for the specific performance of a contract respecting lands in Ireland, the defendant having been served with process whilst temporarily within the jurisdiction of the court." (See also Atkinson *vs.* Leonard, 3 Bro. C. C., 218.)

"In Shattuck *vs.* Cassidy, 3 Edw. Ch. R., 152, and in De Klyn *vs.* Watkins, 3 Sandf. Ch. R., 185, it was held that the jurisdiction of the Court of Chancery in a case of fraud, of trust, or of contract, is sustainable wherever the person sought to be affected is found, although lands not within the jurisdiction of the court may be affected by the decree."

In cases of fraud or trust a person in one State may be decreed to convey lands in another. (See Guarrant *vs.* Fowler, 1 Hen. and Munf., 4; Carfman *vs.* Sayre, 2 B. Mon. Rep., 202.)

"The only question, then, to be considered is whether, in the language of Chief Justice Marshall, in Massie *vs.* Watts, the defendant is liable either in consequence of contract, or as trustee, or as the holder of a legal title acquired by any species of *mala fides* practised on the plaintiff; or as said by Lord Hardwick, in Penn. *vs.* Baltimore, the conscience of the party is bound."

The record shows that defendant knew of plaintiff's rights from the inception thereof, and he must have known that without the passage of the act of March 3, 1863, plaintiff's right to take a patent for the land in question would have been undoubted and undisputed. And more: this action

originally had for an object the restraining defendant from taking a patent for the land, and an injunction to that end was issued, to continue during the pendency of the suit. This injunction was finally modified, at defendant's motion, so as to allow him to take the patent, but as to the other matters left it in full force. (Page 77.)

He was originally enjoined from "entering the land mentioned in the bill, and from receiving the patent for the same, and from conveying the same, and from rejecting the complainant therefrom, until the final hearing of this cause." The subsequent modification allowed him to take the patent, but left that part of the injunction in full force which forbid his conveying the title or ejecting plaintiff.

Under these circumstances, it must appear that defendant had full notice of plaintiff's rights, and that he is bound in conscience to make him a deed. If plaintiff was entitled to patent the land, as I will show, and defendant stepped in and procured a patent for himself, whether getting an act passed by Congress by fraudulent representation or otherwise, then he got that which equity will not allow him to keep; he got something which of right belonged to another, and he is a trustee for that other. In either case, equity would have jurisdiction.

As regards the question of fraud, it makes no difference whether plaintiff, the Government, or both were defranded by defendant. If he was guilty of fraud in procuring a title for himself, and defeating a better right in plaintiff, then he was guilty of fraud, and equity has jurisdiction wherever service of process is made.

In the United States *vs.* Hughes, (11 Howard, 552,) it was held that "when a person entered land according to law, but omitted to obtain a patent for it, and another person afterwards obtained a patent from the United States by proceeding as if it were vacant land, knowing at the same time that it was not vacant, the patent thus obtained will be set aside." The principle of this case is that the patentee had committed a fraud upon the Government in procuring a patent when he had knowledge that another had superior and better rights. As remarked by Justice Wylie, this case decides what will constitute fraud in the eye of equity.

There is nothing better settled by the courts than the right of a citizen, equitable owner of property or an equity in property, to protect his rights, whatever they be, and eventually to lose nothing, although another, knowing the equities, may for a valuable consideration obtain the legal

title thereto. From the statements made, plaintiff had a valid inchoate equitable interest in the land in dispute before the passage of the act of 3d March, 1863, giving defendant the right to enter. He went upon the land after being invited so to do by the acts of 1841, 1853, and the act of June 2, 1862. As to improvement and settlement, he went far beyond the requirements of the law. He was as much a pre-emptor as any settler on the public lands of the United States could be, and just where and when he lost his rights as a pre-emptor is a question I would like to have answered. There is but one way to answer it, and that is to deny it, and assert that this never was public land. Mind, this land had been surveyed as public land "by order of the Commissioner of the General Land Office," and the field notes returned to the surveyor general's office in California, as early as 13th Oct., 1862.

What was the meaning of the following dispatches?

"GENERAL LAND OFFICE, *January* 13, 1863.

"Surveyor General BEALE, *San Francisco, Cal.:*

"Stay proceeding; do not act in regard to Suscol. Answer.

"J. M. EDMUNDS,
"*Commissioner.*"

—

"SAN FRANCISCO, 13*th January*, 1863.

"*To Commissioner General Land Office:*

"Proceedings in survey of Suscol suspended.

"E. F. BEALE,
"*Surveyor Gen'l.*"

Commissioner Edmunds having stopped proceedings in the survey of Suscol, that is, prevented the returns of plats to the Land Office by the surveyor general, next proceeded to head off pre-emption settlers by instructing the register and receiver to take no declaration from settlers.

He tells the surveyor general to stop and not return his plat to the local office; and then sends an order to that office to receive no declarations, because the plats have not been returned. The last mentioned order is as follows:

"*Register and Receiver, Land Office at San Francisco, California:*

"Suscol declarations can only be filed after subdivisional work in field and return of plat. (Sec. 7, act May 30, 1862.) No need for apprehension of claimant. Full instructions by mail.

"J. M. EDMUNDS,
"*Commissioner Gen'l Land Office.*

"WASHINGTON, D. C., *January* 29, 1863."

The Commissioner then writes as follows:

"GENERAL LAND OFFICE, *January* 29, 1863.

"*Register and Receiver, San Francisco, California:*

"GENTLEMEN: Refering to my telegraphic message of this date, I have to add that the Suscol claim (rejected by the Supreme Court, U. S., 1 Black's Reports, p. 541) has not yet been subdivided by the surveyor general as public land. How, then, can declaratory statements be filed when parties cannot, as in this case, give the description of the tract claimed according to the lines of the public surveys? It must be obvious, in the absence of subdivisional work, this cannot be done.

"Where inceptive rights attach under the pre-emption law to lands in the predicament of those embraced by the Suscol, the parties holding *bona fide* interests can suffer no injury nor prejudice. They only stand in abeyance until such surveys are made as will enable them properly to designate their claims in declaratory statements, and thereafter consummate them according to law. At this point I may add that a bill is before Congress, commended by this office and the California delegation to favorable consideration, for the protection of the equitable claims of parties within the limits of the Suscol.

"Very respectfully, your obedient servant,

"J. M. EDMUNDS,

"*Commissioner.*"

This correspondence, taken with the several acts of Congress heretofore mentioned, would seem to indicate that this was considered public land, not only by Congress, but also by those having charge of the Land Office.

"Where inceptive rights attach under the pre-emption law to lands in the predicament of those embraced by the Suscol, the parties holding *bona fide* interests can suffer no injury or prejudice." Then inceptive rights had attached under the pre-emption laws to lands on the Suscol at that date, January 29, 1863, and parties holding *bona fide* such inceptive rights can "suffer no injury or prejudice."

Had the plaintiff herein an inceptive right under the pre-emption laws? He certainly had if it was public land, as I think I have shown.

Again: if it was public land, plaintiff had acquired a right of pre-emption to the quarter in question; if it was not public land, then the act of March 3, 1863, under which defendant claims, was null and void. Possibly it may be admitted

that it was public land, and insisted that it was not subject to the pre-emption laws; that it had been withdrawn.

It is plain that it was, after the decision of the Supreme Court, March 24, 1862—anyhow, after the passage of the act of Congress, June 2, 1862—public land subject to the pre-emption laws.

It was not withdrawn prior to the 28th of October, 1862, date of plaintiff's settlement. In fact, it never was withdrawn. Commissioner Edmunds stopped the surveyor general in California from filing his surveys with the register and receiver, and told those officers to receive no declaratory statements unless the plat was previously filed. By this he delayed the honest settler and pre-emptor, but did not injure or prejudice his case.

I believe it has never been contended by any that this land had been withdrawn from settlement, under the pre-emption laws, prior to the passage of the act of March 3, 1863. But it has been contended, and now is, I believe, that the passage of that act bridged over the space between the decision of the Supreme Court and its passage; that it created a new right in the defendant, and ran back, destroying all other rights in the way and intervening, until it met and joined with the old right pronounced bogus and void a year before by the Supreme Court. But if the act of March 3, 1863, as contended, did withdraw this land from the operations of the pre-emption law, then, just here, I do not wish to establish more. For all I wish now is to establish the fact that it was public land subject to these laws.

Then it is absolutely certain that plaintiff had acquired an "inceptive right."

Again, I may ask, where did he lose that right or that equity?

The surveyor general did not deprive him of it; the register and receiver did not deprive him of it; the Commissioner of the General Land Office did not deprive him of it; for none of them, nor all of them, combined, could deprive him of it. No; it continued, certainly, up to March 3, 1863. Did Congress then take from him his right or equity? Even if Congress attempted to do so, if he really had acquired an inceptive inchoate right or equity, it could do no such thing. Then, if the defendant took the patent under an act passed by Congress without authority, that certainly does not destroy plaintiff's equities, for they remain as before.

If plaintiff ever had any rights or equities in the land, he has them yet, for there is no pretence that he would not have

a right to enter and patent the land in question, but for the passage of the act of March 3, 1863. If plaintiff had acquired any right or equity in this property, so far as the act of March 3, 1863, seeks the sale of said property to another, it is a violation of article five of the amendments to the Constitution. By that amendment it is declared, "nor shall private property be taken for public use without just compensation."

The Government says to complainant: Go on this land, make certain improvements, reside there with your family, and make it your home, and you shall, in the end, have a patent therefor; plaintiff complies with all the conditions made by the Government, and then asks the Government to make the patent according to agreement. But the Government says, No; I cannot do so, for after entering into the agreement with you, and after you had complied with all the conditions thereof on your part, the defendant came along, and knowing of the agreement with you, complained that it was unjust to him, and we have given him a patent to the land, and given him your improvements at the same price you were to pay.

Among individuals this would be a fraud; but as Congress and the General Land Office are parties to the transaction, it is more. It is a violation of the constitutional rights of the plaintiff; a violation of the obligations of Congress to support the Constitution and be guided by it; a violation of the most sacred principles of law and equity, and is a fraud by collusion, or a fraud resulting from the deception practised by defendant and those in his interest.

Defendant, with others, prayed (side page 97) that the title to the rancho be confirmed to the assignees of M. G. Vallejo.

The whole rancho was asked; nothing less; and that, too, without regard to pre-emption claims of *bona fide* settlers.

It is quite certain from the report of the Committee on Public Lands that Congress was grossly deceived by the representations of defendant and associates; that no wrong was intended settlers by the act of March 3, 1863. But the kind veil of charity cannot be thrown over the action of that body upon another occasion, so as to hide its real designs, for when a proposition was made in the House to amend a then pending act, so as to protect the rights of actual *bona fide* settlers on this ranch, claiming under the pre-emption laws, it was voted down. I allude to the act of 1866 to quiet land titles in the State of California. Defendant had not then

received his patent. Mr. Julian offered the following amendment:

"*Provided, however*, That the act of Congress entitled 'An act to grant the right of pre-emption to certain purchasers on the Suscol ranch in California,' approved March 3, 1863, shall not be so construed as to interfere with the claims of *bona fide* settlers on the said lands, who had settled thereon and were claiming pre-emptions, in accordance with the laws of the United States, prior to the time of the passage of the said act."

The survey of this ranch had been authorized by act of Congress; but again in the act of March 3, 1863, it is provided for.

The first section of the act authorizes the General Land Office to extend the lines of the public surveys over the ranch, provided the surveys are paid for by the settlers according to the requirements of the act of May 30, 1862.

The second section provides that *bona fide* purchasers from Vallejo may prove up their claims and purchase at $1.25 per acre, to the extent to which they had reduced the land to possession at the date of the adverse decision of the Supreme Court.

The third section provides for the entry of municipal claims.

The fourth section provides for the presentation of all claims under this act by *bona fide* purchasers from Vallejo, of proof of settlement, and extent to which the tract claimed had been reduced to possession at the time of the adjudication; that the register and receiver shall adjudge the claims by rules to be established by the Commissioner of the General Land Office.

The fifth section provides that any claim not brought before the register and receiver within a year, as aforesaid, shall be dealt with as other public lands.

If not proved up as the act provides, it is again to be public land.

The Commissioner is required to adopt rules for the guidance of the register and receiver in adjusting the claims.

This the Commissioner proceeded to do. The rules are as follows:

"1. The land included in these cases was, for a considerable period, regarded by many as a ranch, and designated the Suscol Ranch. As such it was claimed by Don Mariano Gaudalupe Vallejo, under an alleged grant from the Mexican Government. On the other hand, there were those who

contended that the claim of Vallejo was fraudulent, and that the land was part of the public domain of the United States.

"2. The contest at length passed into the Supreme Court of the United States, and at the December term, 1861, its decision was rendered adverse to Vallejo, and judgment entered on the 24th of March in favor of the United States.

"3. The immediate effect of this decision was to remove or destroy the claim of Vallejo and those holding under him. It, in fact, declared that all along the land belonged to the United States, and as such had been, and must continue to be, open to pre-emption under the general acts of Congress as any other part of the public land.

"4. It therefore follows that any person having the requisite qualification, who settled as a pre-emptor on this land prior to the adjudication of the Supreme Court, or subsequent thereto, and prior to the special act of March, 1863, and who has properly kept up his inaugurated claim, possesses a vested right, of which he cannot be deprived by any legislation of Congress.

It is, indeed, not to be presumed that Congress designed to disturb such rights by the special act.

"5. This special act is in the nature of an enabling or remunerative act, and appears to be intended to compensate, as far as was proper, the claimants under Vallejo for the loss sustained by them as purchasers from him, in consequence of the decision of the Supreme Court.

"6. It requires that, in order to establish a claim under the act, it must first of all appear affirmatively that they are *bona fide* purchasers from Vallejo or his assignees. This implies two things: a valuable consideration and the absence of notice of a valid adverse pre-emption claim.

"7. Such purchasers, in the absence of valid adverse claims, may be allowed the land originally claimed by them to the extent to which they show they reduced it to possession, upon producing evidence of compliance with the other provisions of the law. This may include the whole of the original purchase or only the part actually occupied or possessed.

"8. This occupancy or possession relates back to the 24th of March, 1862, that being the period of the adjudication by the Supreme Court or the date of the entry of the decree. Possession must then have existed: subsequent reduction to possession cannot be considered. The fact itself may be established by proof of actual occupancy or use of the land at that date, or the existence of dwellings, improvements, enclo-

sures within marked trees, stakes, stones, fences, or other visible lines or indications of claims to special tracts.

"9. In addition to proof of *bona fide* purchase, and of reduction to possession, there must be proof of settlement. By settlement is meant a residence within the exterior limits of the ranch or original Vallejo claim. This settlement must necessarily be on a particular tract, and must be continued until the presentation of the claim at the local office, or until proven up. Abandonment of a tract, after the adjudication of the Supreme Court or before proving up, would be a forfeiture of a claim. The claim of a non-resident cannot be approved. The fact of residence on one tract would, however, give conditional validity to a claim for other tracts. Hence, a claimant establishing a right to a single tract may be allowed additional tracts if it appears he purchased them in good faith from Vallejo or his assigns, and without notice of an adverse valid claim, and that by employees or tenants he had reduced them to possession at the date of the adjudication of the Supreme Court.

"10. Coterminous claims may be allowed. These must come in all other respects within the requirements of the act of March 3, 1863.

"11. The first section of the special act renders it lawful for me to cause the Suscol rancho to be surveyed and have the plats returned to the local office, upon payment of the expense thereof by the settlers."

According to the provisions of the 10th section of the act of Congress, 30th May, 1862, to reduce the expenses of the survey and sale of the public lands in the United States, the required payment was commenced 9th of October, 1863, ($100,) and completed November 23, 1863, and the plats returned to the local office, September, October, and December, 1863.

"12. It must appear that the claims under the special act were presented to the local office within 12 months after the return of the plats thereto, which took place as follows, namely."

The foregoing sixth paragraph is particularly noticeable: "This implies two things: a valuable consideration and the absence of notice of a valid adverse pre-emption claim."

But the attention of the court is more particularly requested to paragraph seven.

It will be seen that the 8th paragraph is subject to 6 and 7.

By the terms of the ninth paragraph defendant could not

establish a claim of entry to the quarter in question, if he had notice of plaintiff's adverse claim.

The 4th section of the act of March 3, 1863, makes these rules or instructions the law, so far as the officers of the land department are concerned.

Defendant did have notice of plaintiff's adverse claim.

I believe it is a rule that a statute, public or private, will never be so construed as to divest prior acquired rights—rights acquired prior to its passage.

It is hardly possible that Congress intended by the act of March 3, 1863, to destroy valid existing rights acquired under the pre-emption laws of the United States, for such intent would be worse than criminal; such act would be a palpable violation of the Constitution.

Suppose the act of March 3, 1863, had said in plain terms, "the rights of all pre-emption claimants, except purchasers from Vallejo, are hereby annulled, and shall revert to said Vallejo purchasers;" would this act find support in any court in the land?

Congress certainly never intended any such result, but was deceived into the belief that there were no pre-emptors on the Suscol, or that, if there were, their rights would be protected.

I have already shown enough to establish the fact that plaintiff had, before the passage of the act of March 3, 1863, gained an equity in the land in question. And having done so, and defendant having knowledge of his claim, and then acquiring the legal title, a court of equity will take jurisdiction anywhere that process may be served, unless plaintiff is barred by the pendency of another action.

In the first place, the action mentioned in defendant's answer of February 27, 1868, to plaintiff's amended bill of December 4, 1867, is not an action between the parties to this action. The parties must be the same.

Secondly, the California suit seeks to try the title to the land, which may be done in an action of trespass; but this action is brought in the 15th district court for the city and county of San Francisco—a court having no jurisdiction. In the State of California an action to try the title to land must be brought in the county where the land is situated. This error of course may be cured by answer without objections, but is never cured by a plea of misjoinder.

Thirdly, defendant's (plaintiff here) answer in the California case contains a plea of misjoinder of parties, which must be corrected by order of the court, and by amendment

of the complaint; and when this is done, defendant may interpose a plea to the jurisdiction, either by demurrer or by answer.

Fourthly, in the State of California a plaintiff cannot dictate to a defendant the defence he shall make. (See Record, 249.) Defendant may plead his equities and ask affirmative relief, but he does not lose his rights upon failure to do so, particularly when he is involved in a joint action and his equities are personal and individual; particularly when he is sued jointly with others for an alleged trespass, and for money damages therefor, and when his equities are not shared by his co-defendants and do not have their source in the same matters.

Defendant sets up in his original answer that "he has brought an action of ejectment in the district court of the third judicial district of the State of California, in which State the land in controversy lies, against the said Levi H. Whitney, to recover possession of said land, which action is now pending, and he will be entitled to judgment therein upon proof of his prior possession, unless the said Whitney can show title paramount to the said land named in said bill."

Defendant first says he has an action of ejectment in the third district court, where the land in question is situated. Then he says he has an action in the 15th district court for San Francisco, which is shown to be an action of trespass against complainant and several others.

He has a right to maintain both of these actions at his own cost; at least, if such actions exist, one does not bar the other. But, taken with other acts of defendant, they show to what length he is letting himself out to defeat plaintiff's equities. But if he can maintain these two kindred actions, as they are in California, we certainly can maintain this, which is not like either. But as the argument upon the respective rights of plaintiff and defendant will show clearly plaintiff's equities and defendant's wrongs, it is unnecessary to say anything more, specially as regards the question of jurisdiction.

Up to 1841 some eighteen or twenty statutes had been passed by Congress looking to settlement upon and sale of the public lands.

On the 4th of Sept., 1841, our pre-emption law was passed, under which a settler who takes possession and improves, in accordance with the act, acquires a valid inchoate right, of which he cannot be divested. (See United States *vs.* Fitz-

gerald, 15 Peters, 407; Lytle *vs.* The State of Arkansas, 9 Howard, 333; Delossus *vs.* The United States, 9 Peters, 133; Smith *vs.* United States, 10 Peters, 330; Rice *vs.* Railroad Company, 1 Black, 321.) The last two cases declare plaintiff's inchoate right to the property.

By the act of March 3, 1851, creating the land commission, (Statutes at Large, Vol. 9, page 633,) it is provided: "That all lands, the claims to which have been finally rejected by the commissioners in manner herein provided, or which shall be finally decided to be invalid by the district or Supreme Court, * * * shall be deemed, held, and considered as part of the public domain of the United States."

Then the quarter in question must have become public land the moment the decision of the 24th of March, 1862, was promulgated.

For the act of March 3, 1853, (10 Statutes at Large, p. 244,) to extend pre-emption rights to certain lands therein mentioned, provides:

"That any settler who has settled, or may hereafter settle, on the lands heretofore reserved on account of claims under French, Spanish, or other grants, which have been, or shall be hereafter, declared by the Supreme Court of the United States to be invalid, shall be entitled to all the rights of pre-emption granted by this act and the act of September 4, 1841, entitled 'An act to appropriate the proceeds of the public lands, and to grant pre-emption rights after the lands shall have been released from reservation, in the same manner as if no reservation existed.'"

Then it was not only public land the moment the Supreme Court rejected the Vallejo title, but was also subject to pre-emption. And if no other act had been passed, making valid the settlements on unsurveyed lands, this last one would have that effect, and could have no other. (See act May 30, 1862, Stats. at Large, vol. 12, p. 410.) It does not only attach to the settlement then made the right of pre-emption, but carries that right to all settlements subsequently made. The rights under the pre-emption laws have been extended by statute to all public lands from the Mississippi river to the Pacific ocean, whether such land be surveyed or unsurveyed. But this land was really surveyed before plaintiff settled on the land, although the survey had not been returned by the surveyor general to the local land office. Such return was delayed for the passage of the act of March 3, 1863, which it was hoped would defeat the equities we now

seek to have recognized. It is contended that defendant's possession was sufficient to give him the right of entry under the act of March 3, 1863. This might have been the case, provided he had settled on the tract as the law required him to do, but for plaintiff's valid pre-emption right. Defendant's possession was by tenants, and was not to the entire tract, if enclosure or visible boundaries were required to make possession, and was without settlement, as required by the act, he residing five miles distant, in the city of Vallejo—a locality specially exempted from the operations of the act of March 3, 1863, by that act itself. Then his residence within the original limits of the grant could avail him nothing, that place of residence not being subject to the provisions authorizing him to enter. That which had been reduced to possession was only part of a large body of land held by tenants, defendant never having domiciled on any part of it, or on any other part of the grant subject to the act of 1863. I suppose it will not be contended that a person may enclose one thousand or one million acres of the public land which is subject to pre-emption, and hold it against those making settlement under the pre-emption laws.

At the date of plaintiff's settlement defendant certainly was not a pre-emptor; he resided in a city five miles distant, and never had resided on this tract. His possession was absolutely nothing without settlement, as required by the pre-emption laws, or the act of March 3, 1863. After the decision of the Supreme Court he could have no right of any kind to this land, unless he acquired it under the homestead or pre-emption laws; and having no rights under these laws, he had no rights whatever that would render inoperative the acts of Congress designed to bring such lands within the reach of the actual settler and pre-emptor. After plaintiff had acquired a pre-emption right to the land, could Congress pass an act giving it to defendant unconditionally?"

Certainly not. Then could Congress have given it to him upon condition that he prove himself five feet nine inches high, or prove that he was interested in the Pacific railroad, or that he resided five miles away from the land, or that he had claimed it under a fictitious and void grant, or that he was possessed of great wealth, or that plaintiff was very poor, or that he had utterly broken up and ruined plaintiff? Certainly not; for the imposition of these conditions could not make valid an invalid act of Congress—make constitutional an unconstitutional act. If this be true, the condi-

tions actually imposed—proof of purchase from Vallejo, possession March 24, 1862, &c., &c.—can never destroy plaintiff's pre-emption right.

Congress can neither acquire additional constitutional power, nor break down constitutional barriers or restrictions of power, by making their statutes conditional. The public lands must be disposed of by some act of Congress. (See Constitution, Art. IV, sec. 3; Wilcox *vs.* Jackson, 13 Peters, 498; Menard's heirs *vs.* Massey, 8 Howard, 293.)

By act of 1841; by act of 1851; by act of 1853, and by act of May 30, 1862, and June 2, 1862, heretofore cited, Congress disposed of this land to plaintiff. Defendant could claim under no act before that of March 3, 1863, and before that was passed Congress had disposed of this quarter under the former acts.

Attorney General Speed, in his famous and notorious opinion of May 26, 1866, says: "When, therefore, the Supreme Court reversed the decree of the district court, affirming the validity of Vallejo's claim to the Suscol Rancho, the lands embraced thereby became public lands, and liable to be appropriated by Congress under its general constitutional power over the subject." Then he says: "I assume that the lands embraced by the Vallejo claim fell, upon the adjudication of the Supreme Court, under the operation of the general pre-emption laws as other public lands, or were subject to the operation of special laws of that denomination applicable to public lands in California. But under those laws, settlers could acquire, as I have already stated, no interest which it was not competent for Congress to direct, until they had taken all the steps necessary to perfect prior rights, to make entries of the public lands settled and improved."

He admits this was public land and subject to pre-emption, but says settlers under those laws can acquire no rights which Congress is bound to respect; which amounts to saying the pre-emptor can acquire no rights by a compliance with the pre-emption laws; that those laws are void and of no force. For if the pre-emptor gains no rights that may not be taken from him by Congress, he gains none at all, and the word pre-emptor means slave. The assertion that an American freeman holds his rights, his property, acquired by his toil and his money, at the sufferance of Congress, is monstrous and treasonable.

This land, this township, had been surveyed by money paid therefor by the pre-emption settlers, under the act of May

30, 1862, long before the passage of the act of March 3, 1863. (See 216, page 77.) Yet it is claimed Congress could not only rob the settler of his houses, lands, and growing crops, his fields of ripened grain, but his money also.

In the Comissioner's letter of 13th April, 1866, he says 69,303.82–100 acres had been surveyed prior to the passage of the act of March, 1863, and paid out of moneys deposited anterior and subsequent to the passage thereof, under the act of May 30, 1862. (See Record, 215.)

That plaintiff's rights were beyond the reach of Congress is established by the following decisions:

Barnard's Heirs *vs.* Ashley's Heirs, 18 Howard, 44.
Willot *vs.* Sanford, 19 Howard, 79.
Garland *vs.* Wynn, 20 Howard, 6.
Irvine *vs.* Marshall, 20 Howard, 565.
Burgess *vs.* Gray, 16 Howard, 48.
Lytle *vs.* Arkansas, 22 Howard, 193.
Berthold *vs.* McDonald, 22 Howard, 338.
Clements *vs.* Warner, 24 Howard, 394.
Lytle *vs.* State of Arkansas, 9 Howard, 314.
Brown, lessee, *vs.* Clements, 3 Howard, 666.
Lyndsey *et al. vs.* Haws *et al.*, 2 Black, 554.
Cunningham *vs.* Ashley *et al.*, 14 Howard, 377.
O'Brien *vs.* Perry, 1 Black, 132.

Other opinions of the Supreme Court, and of several State courts, could be cited, but the foregoing ought to be sufficient to establish firmly that when a citizen of the United States goes upon the public lands of the United States, claiming a pre-emption right, and doing all the pre-emption laws require of him or offering to do so, and failing by reason of some act of the land officers, he acquires a right that he cannot be deprived of by Congress or any other power.

I have not seen appellant's brief, and therefore may not meet his argument, and may not anticipate his theory of the case, but I have attempted to meet him fairly on the question made by the record, technicalities excepted.

Respectfully submitted.

JAMES A. JOHNSON,
Of Counsel for Respondent.

Supreme Court of the United States.

JOHN B. FRISBIE, *Appellant*,
vs.
LEVI H. WHITNEY,
} *No.* 298.

BRIEF FOR APPELLEE.

This case is an appeal from the Supreme Court of the District of Columbia.

The land in controversy consists of a single quarter-section, part of a large tract, embracing about ninety thousand acres, known as the Soscol ranche.

Whitney claims under general pre-emption laws of the United States.

Frisbie claims a large portion of the whole tract under the special act of March 3, 1863, and purchases in 1855 from his father-in-law, General Vallejo, who claimed the whole ranche under a pretended Mexican grant.

Frisbie obtained a patent for the land, with due notice of Whitney's rights, under circumstances of fraud and oppression charged in the pleadings.

The relief sought is, that Frisbie be held and decreed to be a trustee for Whitney, and that he be ordered to convey the land to him.

Whitney filed his original bill of complaint in the Supreme Court of the District of Columbia on the 21st of July, 1866, obtaining personal service on the defendant, Frisbie, the same date.—(Pages 1 and 4 Transcript.) Subsequently, by leave of court, on the 30th of July, 1866, Whitney filed his amended bill, and again, on the 4th of December, 1867, by leave of court, amended his bill to state the issuing of the patent for the land

in dispute to John B. Frisbie, which patent had been filed in the case by the defendant below, Frisbie, 7th of May, 1867.—(See pages 87 and 78, Transcript.)

IMPROVEMENT—RESIDENCE—CULTIVATION.

The original bill states, and the answer thereto affirms, that Whitney entered upon and occupied the southwest quarter of section No. 30, in township No. 4, north of range No. 3, west of Mount Diablo meridian, in the county of Napa, California, on or about the 28th day of October, 1862.—(See pages 1 and 5, Transcript.) The bill states that Whitney, "being a citizen of the United States, the head of a family, and otherwise fully qualified therefor, settled on said quarter section of land, with a view to enter the same under the general pre-emption laws; that he erected a dwelling house thereon and occupied the same with his family, and that he has continued to occupy the same, and to cultivate the said land down to the present time."—(See page 1, Transcript.) The answer, whilst not denying Whitney's qualifications or intentions as a pre-emptor, states: "It is true, the complainant did erect on said piece of ground a small frail tenement, and did go there to reside, and his wife has continued to occupy the same ever since; but as to the cultivation of the said land by the complainant, this defendant does not admit the same to be true, unless it be that immediately around and adjacent to the said temporary dwelling there may be a small patch worked, so as to give color to the complainant's pretense of a pre-emption right thereto."—(See page 5, Transcript.)

Proof of nature of improvements by Whitney, and cultivation of land by him, is—

FIRST, BEFORE REGISTER AND RECEIVER.

Whitney made full proof of his pre-emption right before the Register and Receiver by competent witnesses.—(See pages 12 to 16 of the record.) These officers decided against Whitney's right, on the ground that the act of 1863 gave the land to the holders under the Soscol grant; but they say in their deci-

sion "that said pre-emption claimant has resided upon said land and put on valuable and permanent improvements, and there resided with his family.—(See pages 12, 14, 15.)

SECOND, IN THE CAUSE.

In addition to the proof thus made before the Register and Receiver, the complainant below fully proved the same facts by witnesses regularly examined in the cause.—(See pages 46 to 64, Transcript)

DECLARATORY STATEMENT.

Whitney filed his declaratory statement in November, 1862, which was received by the Register of the Land Office of San Francisco, and for which filing he paid the said register the sum of five dollars.—(See pages 57 and 62 of Transcript.)

SURVEYS MADE IN 1862.

The surveys of this township were made and completed during the month of October, 1862, and confirmed on the 20th December, 1862, (see printed record from page 65 to 75, and page 76 to 77,) and the Surveyor General of California was ready to return the plats thereof into the Land Office at San Francisco.

RETURN OF PLATS STAYED AT FRISBIE'S SOLICITATION.

Upon the return of these plats Whitney would have been entitled to enter his land under the pre-emption laws of the United States. On the 13th of January, 1863, less than a month after the verification of the surveys the Commissioner of the General Land Office telegraphed to the Surveyor General, at San Francisco, as follows: "Stay proceedings; do not act in regard to Soscol." The Surveyor General replied the same day: "Proceedings in survey of Soscol suspended." On the 29th of the same month the Commissioner telegraphed the Register and Receiver that the declarations of the pre-emptors could only be filed after the return of the plats, (which return he had ordered by telegraph to be suspended;) and he further informed him that the Vallejo claimants need have no apprehensions.—(See pages 11, 64, and 65, printed record.)

THESE SURVEYS PAID FOR BY WHITNEY AND OTHER PRE-EMPTORS.

The surveys were paid for by the pre-emption claimants on the 18th December, 1862, to which fund Whitney contributed his proportion.—(See letter of Commissioner of General Land Office, page 77; testimony of Robert Waugh, page 47; testimony of J. E. Gokey, page 52; testimony of Levi H Whitney, pages 57 and 62 Transcript.)

PLATS DELAYED BY FALSE REPRESENTATIONS OF FRISBIE.

These unjust proceedings of the Commissioner of the General Land Office, entirely without any warrant in law and in violation of his official duty, were done and performed at the instance of John B. Frisbie, and under the influence of his false statements, proof of which is as follows: First, the amended bill charges that these orders of the Commissioner of the General Land Office were "issued at the suggestion and by the solicitation of the said defendant, Frisbie" The answer to the amended bill on this point is evasive and contradictory. He first swears, in page 29, "that all the knowledge gained by the Commissioner of the General Land Office on the subject was by his *officially* taking notice, according to the usage of the Land Department, of claims pending before Congress, of the action of Congress, and the committee thereof concerning such claims; and this defendant (Frisbie) believes, and says that all action taken by said Commissioner in relation to such lands was *solely and entirely* owing to the information *thus* procured, and in discharge of what the Commissioner regarded as his public and official duties, and entirely without interference therewith effected or attempted by defendant, Frisbie" Having thus sworn that he neither interfered, or attempted to interfere, to produce these results, and that the only knowledge the Commissioner had was "*officially*," he swears in direct contradiction of the above, (page 29;) "nor did he make any suggestions to him (the Commissioner) in relation to said lands *any further than to make known to the Commissioner the grounds of his claims to said lands*," &c. And again, on page 30, he

states "that any instructions given in relation to said lands by the Commissioner of the General Land Office to the Register and Receiver in San Francisco, were given by the said Commissioner exclusively on his own motion, and, so far as is known to the defendant, without the suggestion of any person The defendant denies that he ever in any way influenced, or sought to influence, said Commissioner in relation to any orders made by him touching said grant." These several statements are contradictory of each other. But in further confirmation of the charge in the bill, it is admitted by the defendant (Frisbie) that he was in Washington urging his claims before Congress, and explaining them to the Commissioner. Now, the act under which Frisbie claims, and the passage of which he was urging, did not become a law until March 3, 1863. In the meantime the surveys of Soscol had been completed, and the pre-emption claimants awaiting the performance of the mere ministerial act of the return of the plats to enable them to perfect a *legal* title. Had the Commissioner not interferred by telegraph, the *legal title* would have been perfected before the passage of the special pre-emption act of 1863 Even then, without the admission by Frisbie of his "suggestions" to the Commissioner, the inference is irresistable, that the acts done being entirely out of the ordinary course of law, were procured to be done by those to whose benefit they were to enure. In further confirmation of this view of the case, we find the Commissioner saying in his telegram (page 11) "no need of apprehension for claimants;" and again, on page 76, a few days after the telegram, we find a letter from the ommissioner of the General Land Office to Frisbie at Willard's Hotel, Washington, D. C., transmitting to Frisbie, in accordance with his request, a copy of his communication referred to in his telegram.—(See page 76, printed record.)

On the 3d of March, 1863, at the instance of the Vallejo claimants, a special pre-emption act was passed. On the 4th of March, the day following the passage of the act, the plats were returned by the Surveyor General in California.—(See page 76.)

WHITNEY PROVES UP HIS CLAIM BEFORE REGISTER AND RECEIVER.

On the 7th of October, 1864, after due notice to both parties, Whitney proved up his claim to a pre-emption before the Register and Receiver of San Francisco, California, the Register and Receiver deciding upon his proofs that, although otherwise entitled to pre-empt the land, his claim should be rejected and disallowed "upon the ground that the land was not open for settlement, and had been withdrawn by the special act of March 3, 1863."

OPINION COMMISSIONER GENERAL LAND OFFICE.

This case, amongst others of the Soscol casses, was sent up to the Commissioner of the General Land Office, who decided in favor of several of the pre-emption claimants as against the Vallejo claimants under the special act of 1863.

OPINION ATTORNEY GENERAL SPEED.

On an appeal from said decision the Secretary of the Interior referred the legal question involved to Mr. Attorney General Speed, who decided that, "during the interval between the institution of the settlement and the establishment of the claim by proof and payment of the consideration nominated by the law, Congress had power to dispose of the land at its pleasure. It may recall the privilege previously conferred, or invest any one else with the same privilege, or it may make an absolute grant of the land to other parties with or without consideration.

PRE-EMPTION CLAIMANTS REFUSED FURTHER HEARING IN GENERAL LAND OFFICE.

Shortly after the delivery of this opinion the Secretary of the Interior instructed the Commissioner of the General Land Office that it was not his (the Commissioner's) province to decide whether a party asserting a right to a parcel of land included in the Soscol tract had made proof of personal settlement, and the other facts which would, under ordinary circumstances, and in the absence of a permanent claim of a Vallejo purchaser, empower the claimant under the general pre-emption laws to "prove up" and acquire title.—(See page 10, printed

record.) Thus, as charged in the bill, (see page 8, printed record,) Whitney was denied an investigation of his proofs taken to establish a right to his pre-emption.

Frisbie has never resided on the land, nor has he or any other person except the appellee made any claim to enter the same under the general pre-emption laws of the United States.

The points relied upon by the apellee are as follows:

1. The title of M. G. Vallejo to the Soscol ranch wa adjudged by the Supreme Court of the United States to be entirely void and of no effect, on the 24th of March, 1862, (printed record p. 2, and 1 Black, 541.

2 By virtue of that decision the whole of said ranch became a part of the public domain subject to settlement and pre-emption by the terms of the acts of March 3d, 1851, March 3d, 1853, vol. 10, Stat., p 246, and other act same date, vol. 10, Stat., p 244, June 2d, 1862, vol. 12, Stat., p. 410, and September 4th, 1841, whether surveyed or unsurveyed. (Transcript, fol. 2.)

3. That the appellee entered upon the land on the 28th of of Occober, 1862, with the *bona fide* intention of pre-empting the same under the general pre-emption laws.—(Transcript, fols. 1 and 5.)

4. That at the time of said entry he possessed all the qualifications of a pre-emption settler under the pre-emption laws of the United States.—(Transcript, fols. 1, 12, 13, 14, 15.)

5. That he erected a dwelling-house thereon, occupied the same with his family, has continued to occupy the same since his entry down to the present time, and to cultivate and improve the said land.—(Transcript, fols 1, 5, 13, 14, 15, 47, 48, 49, 50, 51, 52, 56, 57.)

6. He filed his declaralory statement in November, 1862, in the proper office, paying the register the fee of five dollars for filing the same.—(Transcript, fols. 57 and 62.)

7. Whitney and other settlers deposited the money with the Surveyor General on the 18th of December, 1862, for the survey of this ranch, including this quarter section.—(Transcript, fols. 61, 57, 52, and 77)

8. That Whitney has fully and faithfully performed all the

conditions required by the pre-emption laws of the United States to entitle him to enter the land and receive a patent for the same.—(Transcript, fol 1.)

9. That before the 13th of January. 1863, the plats of the surveys were ready to be returned to the local land office; that on the 13th of January, 1863, at the instance of Frisaie, the Commissioner of the General Land Office at Washington, without authority of law, ordered the Surveyor General to withhold such plats; that in pursuance of such order the plats were withheld, until after the passage of the special act of March 3d, 1863; that by reason of said unjust and illegal and fraudulent proceedings Whitney was prevented at that time from entering the land; that at that date Whitney was at the land office waiting and anxious to make his proofs, to pay the legal price and enter the said lands, but was prevented by such unjust and illegal orders.—(Transcript, fols. 8, 11, 12, 65 lo 67.)

10. That on the 7th of October, 1864, the register and receiver look the proofs in respect to Whitney's pre-emption claim; that said proofs are full and complete, and show him to be entitled to said land under the pre-emption laws.—(See Transcript, fols. 3, 12, 13, 14 and 15.)

11. That the register and receiver decided that Whitney was qualified as a pre-emptor, and had done all the acts required of him by the pre-emption laws, but decided against him on other grounds.

12. Frisbie has never resided on said tract of tand, nor has he ever made any settlement thereon within the meaning of the special act of March 3d, 1863, or any other pre-emption act of the United States —(Transcript, fols. 2, 51 and 59.)

JURISDICTION.

A Court of Equity will look into the proceedings before the register and receiver, and even into those of the Land Office, where the right of property is involved, and correct errors of law or of fact to his prejudice.—Lytle *vs.* State of Arkansas, 9 How., 314; Cunningham *vs.* Ashley, 14 How., 377; Barnard's Heirs *vs.* Ashley's Heirs, 18 How., 44; Garland vs.

Wynn, 20 How. 6; Clements *vs.* Warner, 24 How., 394; Lytle *vs.* State of Arkansas, 22 How.. 193; Brown *vs.* Clements, 3 How., 666; Lyndsay, *et al.*, *vs.* Haws, *et al.*, 2 Black, 554; O'Brien *vs.* Perry, 1 Black, 132; Bird, *et al.*, *vs.* Ward and Cravens, 1 Mo., 281; United States *vs.* Stone, 2 Wallace, 535; United States *vs.* Hughes, 11 How., 552; State of Minnesota *vs.* Batchelder, 1 Wallace, 109.

2. This being a case of fraud and trust the Supreme Court of the District of Columbia had jurisdiction over the persons, both parties being in Washington and the defendant below having been served with process within the District.—United States *es.* Kendall, 12 Peters; Earl of Arglasse *vs.* Muschamp, 1 Vern., 77, 135; Baker's case, 2 Atk. R., 66; Atkinson *vs.* Leonard, 13 Bro. C C., 218; Toller *vs.* Carteret, 2 Vern., 494; Shattuck *vs.* Cassidy, 3 Edw. Ch. R. 152; Lord Cranstown *vs.* Johnson, 3 Ves., 170; Deklyn *vs.* Watkins, 3 Sandf. Ch. R., 185; Guarrant *vs.* Fowler, 1 Hen. and Mumford, 4; Caufman *vs.* Sayre, 2 B. Man. Rep. 202; Buchanan *vs.* Lorman, 3 Gill, R. 52; Penn *vs.* Lord Baltimore, 1 Ves., 444; Great Falls Manufacturing Co. case, 3 Foster, 462, and cases there cited, Massie *vs* Watts, 6 Cranch, 148; Mead *vs.* Merritt, 2 Paige, 402; Hawley *vs.* James, 7 Paige, 220; William Briggs *vs.* Arthur French, 1 Sumner, 504; Kerr, *et al.*, *vs.* Watts, 6 Wheaton. 550; Starks *vs.* Mather, 1 Walk. Miss., 193.

3. In this case there is both actual and constructive fraud. The fraud consists in attempting to defeat by false representations, the equitable title of the appellee, in obtaining the legal title by false representations and violent and illegal acts, and in procuring the legal title with a knowledge of the prior equitable title of the appellee. Here is also trust, the appellant having procured the legal title with a knowledge of the prior equitable title of appellee, is in equity a trustee for him.—Magmiac *vs.* Thompson, 7 Peters, 348; Caldwell *vs.* Carrington, 9 Peters, 103, and cases there quoted; Massie *vs.* Watts, 6 Cranch, 148; Briggs *vs.* French, 1 Sumner, 504; 6 Page, 88; Lyon *vs.* Hunt, 11 Ala., 295; Kerr, *et al.*, *vs.* Watts 6 Wheaton, 550; James Galloway *vs.* Henry R. Finley *et al.*, 12

Peters, 264; U. S. *vs.* Hughes, 11 How. 552; 1 Story Equ., sec. 395, 396; Smith, *vs.* Stephenson, 7 Miss. Rep.; Grover's Heirs *vs.* Pulsome, *et al.*, 16 Miss., 544; 1 Story Equ. Ju., pp. 205, 213, 353, 411; Willard's Equ. Ju., 609, 610; Jewel, *et al.*, *vs.* Porche, 2 An. R., La., p. 148; 3 Louisiana, 107; 5 Martin, 663; 11 Martin, 212; 17 La., 230; 2 Howard, 318.

PRE-EMPTION ACTS.

The pre-emption act of 1841, and the acts supplementary thereto, create a valid and binding contract between the Government an the actual settler upon the public domain, subject to be defeated only by the wilful neglect of the settler to carry out their provisions. The settlement and improvement constitute the consideration on the part of the settler. The right to enter the land becomes vested as soon as the settlements and improvements are made.

The refusal or neglect of the agents of the Government to do any act required by the law to be done by such agents to carry out the contract of the Government, connot affect injuriously the rights of the settler.

All acts done by these agents in violation of the law are void or voidable, and can in no way prejudice the rights of the settler. This vested right to the land cannot be taken away by Congress without just compensation, *a-priori;* it cannot be affected by the acts or rulings of the ministerial officers of the Government, whether acting within the provisions of an unconstitutional law, or under an erroneous construction of a constitutional law.—Fletcher *vs* Peck, 6 Cranch; New Jersey *vs.* Wilson, 7 Cranch; U. S. *vs* Fitzgerald, 15 Peters, 419; Cunningham *vs.* Ashley, 14 How., 377; Barnard'e Heirs *vs*- Ashley's Heirs, 18 How., 43; Garland *vs* Wynn, 20 How., 8; Clements *vs.* Warner, 24 How., 397; Lynday, *et al.*, *vs.* Haws, 2 Black, 554; Rice *vs.* R R. Co., 1 Black, 358; Polk's Lessees *vs.* Wendell, 9 Cranch, 87; McArthur *vs*- Crowder, 4 Wheaton, 448; Lytle *vs.* Arkansas, 9 How., 333; Finley vs. Williams, 9 Cranch; McAfee *vs.* Kim, 7 S. and M. Miss. Rep., 780; Isaac *vs.* Steele, 3 Scam., 97; Bruner *vs* Manlove, 3

Scam., 339; Brown *vs.* Griswold, 11 Illinois, 520; Bird, *et al.*, *vs.* Ward & Cravens, 1 Missouri, 281; Allison *vs.* Hunter, 9 Missouri; Worn *vs* Marshall, 20 How., 565; Steamship Co. *vs.* Joliffe, 20 Wallace, 456; U. S. *vs.* Stone, 2 Wallace, 535; State of Minnesota *vs.* Batchelder, 1 Wallace, 115; Wilcox *vs.* Jackson, 13 Peters, 498; Willot *vs.* Sanford, 19 How., 79; Dubuque and Pacific R. R. Co. *vs.* Litchfield 23 How., 88; O'Brien *vs.* Perry, 1 Black, 132; Minter *vs.* Crommelin, 18 How., 87; Tennet *vs.* Taylor, 9 Cranch, 43; Paulett *vs* Clark, 9 Cranch, 292.

Opinion of Attorney General Mason, April 25th, 1846; Opinion of Attorney General Cushing, vol 8, p. 394; Lester's Land Laws, pp. 550 and 662; Opinion of Commissioner Edmonds in soscal cases, January 13th, 1866; sec. 2, act March 3d, 1843; Stat., vol. 5, p. 620; Lester's Land Laws, p 85; Story's Commentarys on the Constitution, section 1330; The Society, etc. *vs.* New Haven, 8 Wheaton, 493; Lester's Land Laws, 483

A pre-emption right is an interest in land, and descends by statute to the heir in whose favor an entry may be made and patent issued.—Sec. 2 act March 3d, 1843, Stat., 5, p. 620.

A pre-emption right is property, and attaches to the land from the commencement of a settlement thereon, and the courts enforce this right, though the executive departments may have rejected it and sold the land to which it was attached to other parties according to other laws. A mere entry on the land with the intention of pre-empting the same creates an inchoate title that withdraws the land from the public domain.—Cushing, opinions of Attorney General, vol. 8, p. 394.

The right of pre-emption attaches at the date of settlement, and is then a vested right, which can be divested only by abandonment, or a wilful neglect of the performance of the conditions subsequent required by the pre-emption laws.—Opinion of the Secretary of the Interior, December 20th, 1851; Lester, p 550; Lytle *et al*, *vs* Arkansas, 9 How., 333; McAfee *vs.* Keim, 7 S. and M., p. 788, and cases before quoted.

When a pre-emption right has once vested, while tha, right

continues no other appropriation of the land can be made.—Wilcox *vs.* Jackson, 13 Peters, 513; U. S. *vs.* Fitzgerald, 15 Peters, 420; Clements *vs.* Warner, 24 How., 397, and cases before quoted.

SPECIAL ACT OF MARCH 3, 1863.

There are two constructions to be given to this act: First, that claimed by the appellant, as fully set forth in the opinion of Mr. Attorney General Speed of May 26, 1866, the effect of which is a grant of the land to the Vallejo claimants, under certain conditions, to the exclusion of all other persons. This construction would make the law unconstitutional. Second, the construction given in the opinion of the court below.

RULES OF CONSTRUCTION.

The act being in the nature of a private act, it is not to be construed as passing any title in ambiguous words.

The words used in the act are to be taken in their fixed legal meaning. Thus, the title of the act is an act to grant the "right of '*pre-emption.*'" The executive officers directed to carry out the act are the *Register and Receiver*, who are to take the usual "proofs" necessary in pre-emption cases. The land is to be surveyed under the act of May, 1862, (a pre-emption act.) The money for the surveys is to "be paid into the surveying fund by *settlers* according to the requirements of the tenth section of the act of Congress, approved 30th May, 1862." The land is to be surveyed according to "*the lines of the public surveys.*" The Vallejo purchasers are "to enter '*according to the lines of the public surveys,*" not according to the lines of their deeds from Vallejo, "at $1.25 per acre," the price nominated in the general pre-emption laws. They are to *enter* the land "to the extent to which the same had been reduced to *possession* at the time of said adjudication of said Supreme Court," not to the extent of their purchases from Vallejo. Like the general pre-emption claimants, they are to present their *claims* to the *Register* and *Receiver* within twelve months after the return of such surveys to the district land office. Their claims are to be accompanied by proof of "*settlement,*" and with an appeal, as

in other pre-emption claims, from the decision of the Register and Receiver to the Commissioner of the General Land Office.

This act being a part of the general system referring to it, using the fixed terms of that system, and to be executed through its provisions and machinery, is not to be construed to repeal or annul, by implication, any of its provisions. Construed in accordance with the general system, it is just, equitable, and proper. Construed as a repeal of that system, it is unconstitutional, unjust, and inequitable. To do this a new meaning has to be given to all the terms used in the act; the general system must be considered repealed by implication; vested rights must be taken away, and a new rule of decision adopted in pre-emption cases, both in the departments and in the courts. It must be borne in mind that this special act does not purport to be a confirmation or recognition of any pre-existing equitable title or right. The report upon which the bill was passed represented there to be many thousands of "*settlers*" upon this ranch. The bill was passed at the instance of the Vallejo claimants, upon the basis of these statements. According to the representations made by them to Congress, there being several thousand *settlers* and but about 90,000 acres. Each Vallejo claimant only asked for a less quantity than a single quarter section. Under the general pre-emption system the first settler on each entire quarter section would, in some cases, have been entitled to the entire quarter section, irrespective of the improvements of others The object of the law, in light of these representations, upon which it was passed, was therefore most plainly to confine each settler to his own improvements; and, to settle difficulties that might arise between these several thousand settlers, where more than one was on the same quarter section, it restricts the amount to be received by each to that which they had reduced to possession at the time of the adjudication of the case by the Supreme Court, providing also for "*joint entries*" by coterminous proprietors. If the land was to be entered in large tracts of a thousand acres or more, why the provision requiring the land to be surveyed according to the lines of the public surveys, or why the necessity of any

continues no other appropriation of the land can be made.—Wilcox *vs.* Jackson, 13 Peters, 513; U. S. *vs.* Fitzgerald, 15 Peters, 420; Clements *vs.* Warner, 24 How., 397, and cases before quoted.

SPECIAL ACT OF MARCH 3, 1863.

There are two constructions to be given to this act: First, that claimed by the appellant, as fully set forth in the opinion of Mr. Attorney General Speed of May 26, 1866, the effect of which is a grant of the land to the Vallejo claimants, under certain conditions, to the exclusion of all other persons. This construction would make the law unconstitutional. Second, the construction given in the opinion of the court below.

RULES OF CONSTRUCTION.

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in other pre-emption claims, from the decision of the Register and Receiver to the Commissioner of the General Land Office.

This act being a part of the general system referring to it, using the fixed terms of that system, and to be executed through its provisions and machinery, is not to be construed to repeal or annul, by implication, any of its provisions. Construed in accordance with the general system, it is just, equitable, and proper. Construed as a repeal of that system, it is unconstitutional, unjust, and inequitable. To do this a new meaning has to be given to all the terms used in the act; the general system must be considered repealed by implication; vested rights must be taken away, and a new rule of decision adopted in pre-emption cases, both in the departments and in the cou ts. It must be borne in mind that this special act does not purport to be a confirmation or recognition of any pre-existing equitable title or right. The report upon which the bill was passed represented there to be many thousands of "*settlers*" upon this ranch. The bill was passed at the instance of the Vallejo claimants, upon the basis of these statements. According to the representations made by them to Congress, there being several thousand *settlers* and but about 90,000 acres. Each Vallejo claimant only asked for a less quantity than a single quarter section. Under the general pre-emption system the first settler on each entire quarter section would, in some cases, have been entitled to the entire quarter section, irrespective of the improvements of others The object of the law, in light of these representations, upon which it was passed, was therefore most plainly to confine each settler to his own improvements; and, to settle difficulties that might arise between these several thousand settlers, where more than one was on the same quarter section, it restricts the amount to be received by each to that which they had reduced to possession at the time of the adjudication of the case by the Supreme Court, providing also for "*joint entries*" by coterminous proprietors. If the land was to be entered in large tracts of a thousand acres or more, why the provision requiring the land to be surveyed according to the lines of the public surveys, or why the necessity of any

other evidence than that of a purchase from Vallejo or his assigns? Why, under these circumstances, did not Congress, as it was asked to do in the petition of the Vallejo claimants, confirm the grant to Vallejo for this ranch? Plainly because, from the representations made in writing, it appeared to that body that, on account of the large number of settlers upon the ranch, each claimed less than a quarter section, and because it intended to grant only a "right of pre-emption" in considera- for actual settlement and improvement. The law requires them to make the usual proofs, gives them a year within which to make them, and after which time their claims shall be barred, and any lands covered by them shall be dealt with as other public lands. The reasons which moved Congress to pass this bill were not that Vallejo, the Mexican grantee, had any equitable claims to the consideration of the Government nor that those who speculated in Mexican grants were entitled to any such consideration; they were that there were thousands of settlers on the lands who had small permanent and valuable improvements, and in accordance with the earliest practice of the Government, as a part of the public policy of the Government, these several thousand settlers were to be permitted to retain each his small homestead which he had rendered valuable by his improvements.

The report of the committees, (see House report 20, also Senate report 95—both the same—third session, Thirty-seventh Congress,) upon which the act was passed, shows that it was passed for the relief of "*a multitude of small holders,*" into whose "*possession*" it had passed, and who had "*covered*" it with "numerous small farms and orchards, each enclosed by substantial fences, highly cultivated, and dotted all over with comfortable farm-houses and other buildings," and that there were some "3,000 *families settled*" on the ranch holding under the Vallejo title. And further, "The bill reported by this committee respects the occupancy of the *numerous holders* under this title, *recognizing it as a pre-emption.*" "It has been the uniform practice of Congress to respect and protect the *improvements of settlers,*" &c., &c.. Construe this act, then, in

the light of this report, and its meaning is clear. In proof that this is admissible, the following authorities are quoted:

1. The act being a private act, the report of the committees, upon which the act is founded, are admissible to throw light upon its construction, (opinion of Attorney General Wirt, February 24, 1823.)

2. Being a private act, it is to be construed strictly; where the words admit of different meanings, those meanings are to be adopted which are most favorable to the public interests, (Opinion of Attorney General Black, November 22, 1858, sustained in case of Littlefield as. Dubuque and Pacific Railroad Company, 23 How. 88.)

3. Where there is any doubt as to the construction of a law, it is legitimate to go to the title to throw light upon the doubt (Fisher *vs.* Blight, 2 Cranch, pp. 389 and 390.)

Laws upon the subject uf the public land, whether of a public or private nature, are to be construed together.—Opinion of Attorney General Wirt, December 31st, 1826; Choutard *vs.* Pope, 12, Wheaton, 586.

4. The law never favors a repeal of a law by implication, and though two acts are seemingly repugnant they shall if possible have such construction that the latter may not repeal the former by implication.—Dwaris on Statutes, p. 530.

5. "If the law admits of two inter etations, that is to be adopted which is agreeable to the fundamental or primary law."—Lieber quoted in Sedgwick's Treatise, p. 288.

6. The consequences are to be considered in expounding laws where the intent is doubtful. Any construction of a law that supposes an intention to disregard rights or overthrow fundamental principles is warranted only where the legislative intention is expressed with irresistible clearness.—Fisher *vs.* Blight, 2 Crance, 389 and 390; Opinion of Attorney General Cushing, vol 6, p. 700; Opinion of Attorney General Legare, vol. 4, p. 71

7. If the law is not constitutional when construed to repeal the general system, and constitutional and operative (as well as just and equitable) when construed as a part of it, it should be construed in accordance with the general system.

8. The words "pre-emption," "settlers," "possession," "settlement," "joint entries," &c., &c., having a fixed construction in the general land system, are to have the same construction in this special act.

1. "The right of pre-emption" is a right to enter a hundred and sixty acres of land or a fractional part thereof.

2. "Settlement" means actual, personal residence on the land wilh his family, if the setiler have one.

3. The word "settler" in the pre emption system means one who is living on the land. A man can not live at Vallejo and be a "settler" upon the quarter section or ranch.

4. The word "possession" means actual, personal occupancy, not a mere constructive possession.

5. The term "joint entries" in the pre-emption system is used to describe a case where settlements are made by two or more settlers, *prior to the public surveys*, and upon the lines being subsequently run, it appears that they are all upon the same quarter section, and in some such cases the law permits a joint entry by co-terminus proprietors, and in others it permits the parties to take adjacent quarter sections (including their respective improvements) by adjustment among themselves. But in no case do they take more than a quarter section each, and in some cases less.

6. The words "proof of settlement" mean such proof as a pre-emption claimant, under the general laws is required to make. That is, an actual entry prior to that of any adverse claimant, actual personal residence, continuing down to the date of proof as well as the necessary cultivation and improvement.

7. The "proof" as to "the extent to which the same had been reduced to possession" is that of actual personal occupancy.

8. The term "to enter" according to the line of the public survey means the entry of a quarter seetion, or less, according to those surveys.

9. Congress will be presumed to have intended to grant the right of pre-emption only to such lands as had not been appropriated by pre-emption settlers under the general pre-emption

laws. Otherwise the law must be construed as intending to arrest the general public policy of the Government, to infringe private rights, and overthrow the previous established principles of the general land system by implication.

10. As between a pre-empter under a special law and one general system, the one making the proof of prior settlement within the meaning of those laws has the better equity.

11. No person residing in a city or town away from the land which he claims can have a pre-emption right within the meaning of the special act or general laws.

12. No person claiming a large tract of more than a thousand acres by constructive possession can claim a pre-emption right under the special or general laws.

No settlers under the special pre-emption act can claim a pre-emption right who have not paid moneys for the "survey and platting," "according to the requirements of the 10th section of the act of Congress, approved the 30th of May, 1862." (It is in proof in this case that the surveys were made and the money paid by the claimants under the general pre-emption laws before the passage of the special act.)

13. It being legitimate to regard the consequences of a certain construction of a doubtful private act, which construction would make the private act repugnant to a general system and injurious to private rights, the following consequences are submitted, as flowing from the construction necessary to establish the appellant's claim:

1. That the inducements to settle up new countries under the general pre-emption system of the United States will cease, because a settler may spend an unlimited amount of money upon his quarter section, and do every act required of him by the general pre-emption laws, and yet be liable at any time before actual payment and entry to have his improvements and the fruits of his time and labor taken away from him without just compensation. The same construction will apply to settlers under the Homestead bill. The immediate effect of the enunciation of such a doctrine as this by the Supreme tribunal of the country, will be to cast a cloud upon the equitable title

of every pre-emption and homestead in the country, to discourage pre-emption and homestead settlements by our own citizens, as well as to shake the faith in our land system of the thousands of the intelligent of foreign countries who are flocking here to find a home For if the legislative department can, at will, deprive the pre-emption or homestead claimant of his improvements and time and labor, what man will consider it safe to trust all that he has on so uncertain a basis? Pre-emption and homestead laws are enacted for the poor and homeless, in the most enlightened spirit of public improvement, and yet in this case by the construction sought, the rich are to obtain grants of principalities under the guise of a "pre-emption right," whilst the poor are driven from their homes.

2. Under this construction sought the words "pre-emption," "settlement," "settler," "possession," etc., etc., are to have a new meaning, the established precedents, rules, action and decisions of the land department (as well as of the courts) are to be set aside, and every claimant is to depend for the security of his right, not upon general prospective laws, but upon special acts. In place of a general prospective pre-emption and homestead system, we are are to have special legislation with its attendant evils.

DUNCAN S. WALKER,
Of Counsel for Appellee.

ABSTRACT OF SOME OF THE AUTHORITIES.

ACTS OF CONGRESS

Act March 3d, 1851, Stat vol 9, p. 633, sec. 13.—"That all lands, the claims to which have been finally rejected by the Commissioners in manner herein provided, or which shall be finally decided to be invalid by the District or Supreme Court, * * * * * shall be deemed, held and considered as part of the public domain."

Act March 3d, 1853, vol. 10, p. 244, Stat.—"That any settler who has settled, or may hereafter settle, on lands here-

tofore reserved on account of claims under French, Spanish, or other grants, which have been or shall be hereafter declared by the Supreme Court of the United States to be invalid, shall be entitled to all the rights of pre-emption granted by this act and the act of September 4th, 1841, entitled 'An act to appropriate the proceeds of the public lands and to grant pre-emption rights,' after the lands shall have been released from reservation, in the same manner as if no reservation existed."

Act of June 2, 1862; act of September 4, 1841.

RULES OF DECISION OF EXECUTIVE DEPARTMENTS IN PRE-EMPTION CASES.

Attorney General Mason, opinion, April 25, 1846, (expounding act, September 4, 1841.)

"The settler is entitled to protection against the claims or entries of others. From the moment, therefore, that he enters in person on land open to such claim, with the *animus manendi*, or rather with the intention of availing himself of the provisions of the act referred to, and does any act in execution of that intention—he is a settler. He must afterwards give his notice of intention, inhabit, improve, build his house, and make his proof and payment within the time stipulated to perfect his right. *But in every stage he is protected* until he fails *on his part* to comply with the conditions of the law."

Opinion of Secretary of the Interior, December 20, 1851, (Lester's Land Laws, p. 550.)

"Subsequent entries, however, which have been made by pre-emption, *in virtue of settlements made prior to the grant*, will be valid, because in those cases the right of pre-emption attached from the date of settlement, and became a *valid right* which can be divested only by abandonment or a failure in the performance of its conditions."

Opinion Attorney General Cushing, (vol. 8, p. 394, Opinion.)

"The pre-emptor acquires inchoate an incipient title by entering on the land and there performing certain acts, by means of which the land is appropriated to his individual use, and thus segregated, in fact, from the public domain. If in addition to these acts done on the land, the pre-emptor after-

wards performs certain acts of notice and proof in the local land office, then his previous equitable title is converted into a legal one."

DECISIONS OF SUPREME COURT.

U. S. *vs.* Fitzgerald, 15 Peters, 420; Pre-emption law 19th June, 1834. Retrospective act—a pure bounty. Court says:

"As no reservation or appropriation of the land made after the right of the defendants accrued under the act of 19th June, 1834, could defeat that right, it is useless to inquire into the authority by which the Secretary of the Treasury attempted to make the reservation."

Wilcox *vs* Jackson, 13 Pet., 513; (affirmed, 20 How., 565.) Court says:

"But we go further and say, that whensoever a tract of land shall have once been legally appropriated to any purpose, from that moment the land thus appropriated becomes severed from the mass of public lands, and that no subsequent *law*, or proclamation, or sale would be construed to embrace it, or to operate upon it, although no reservation was made of it."

Brown's Lessee *vs.* Clements, *et al*, 3 How. 666. (Quoted in 9 How., 314) Plaintiff had *paid* only for ninety-two acres, but had pre-emption right to quarter section. Defendant had entered, paid for and received patent for residue. Plaintiff recovered whole. Retrospective pre-emption act. The Court says:

"The act of 29th May, 1830, to grant pre-emption rights to settlers on the public lands, chap. 207, appropriated this quarter section of land, on which Etheridge was then settled, to his claim, under the act, for one year, subject, however, to be defeated by his failure to comply with its provisions. During that time this quarter section was not liable to any other claim, or to be sold to any other person, except at public sale under the proclamation of the President of the United States; and *that* Etheridge had a right to prevent, by paying for it as directed by the act. And as he has complied with all the requisitions of the act, as far as the *mistakes* and *illegal acts* of the *ministerial* officers of the Government would permit, he has

acquired a good title by his patent against the United States for the *whole* of said southwest quarter section." The Court then say that plaintiff's pre-emption claim is better than defendant's patent.

Lytle *vs.* Arkansas, 9 How., 333.

It will be observed, in this case, that Cloyes settled on the land in 1829, and was a mere trespasser upon the public domain. That the act of May 29, 1830, provided that these trespassers should be entitled to a pre emption upon furnishing satisfactory proof to the Register and Receiver on 28th May, 1831, but that the Register and Receiver refused to receive the money for the land. The case stands thus, when, under a grant from Congress, Governor Pope locates this land, and patents it to others. It is at this stage of the case that the Court decide that Cloyes had a vested right, subject to be defeated only bo his negligent failure to comply with the law, and which the Court will not construe Congress to have endeavored to take away.

Now, as to one quarter section, he had the certificate of the Register and Receiver; as to the others, he had their decision, that, under the law, he was only entitled to the subdivision on which he resided. The Court decide that, under the law, restricting a party to his improvements, he was only entitled to pre-empt the subdivision on which ne resided; but, as in all these pre-emption cases, and as declared in this case, they go into all the facts, and do not recognize the certificate of Registers and Receivers, or patents from higher authority to bar the equitable title. If such certificates or patents were conclusive, the Court would say they were so, without going into the facts. This case came up again in 22 How., when the claim herein decided to be better than the patent was set aside after another patent, because the facts did not entitle Cloyes to a pre-emption

Note also the fact, that, the act under which Cloyes claimed was a retrospective act, in the nature of a bounty to a trespasser The act of 1841 is a prospective act in the nature of a contract. In Cloyes' case, the grant was to a territory for great public purposes, and yet it was held not to divest the

vested right, or to be so construed. In the case at bar, the grant is to private individuals of a "*pre-emption right.*"

"In the third section of the act, it is provided that before any entries being made under the act, proof of settlement or improvement shall be made to the satisfaction of the Register and Receiver of the Land District in which the lands may lie." In 1831 the Register and Redeiver held that Cloyes was entitled to the northwest fractional quarter, but no payment was made." "The Register and Receiver were constituted a tribunal to determine the rights of those who claimed pre-emptions under it. From their decision no appeal was given. If, therefore, they acted within their powers as sanctioned by the Commissioner, *and withih the law*, and the decision cannot be impeached on the ground of fraud or *unfairness*, it must be considered final." "It is a well-established principle, that where an individual in the prosecution of a right *does everything which the law requires him to do*, and he fails to attain his right by the *misconduct or neglect* of a *public officer*, the law will protect him." In this case the pre-emption right of Cloyes being secured by settlement and improvement, the act being a bounty to a settler, before the act a trespasser, and an offer to pay the money for the land claimed by him, under the act of 1830, nothing more could be done by him, and nothing more could be required of him under the act. And subsequently, when he paid the money to the Receiver, under subsequent acts, the surveys being returned, he could do nothing more than to offer to enter the fractions, which the Register would not permit him to do. "This claim for pre-emption stands before us in a light not less favorable than it would have stood if Cloyes or his representatives had been permitted to do, what, in this respect, was offered to be done. The claim of pre-emption is not that shadowy right which by some it is considered to be. Until sanctioned by law, it has no existence as a substantive right. But when covered by the law, it becomes a legal right, subject to be defeated only by a failure to perform the conditions annexed to it. It is founded in an enlightened public policy, rendered necessary by the enterprise of our citizens."

"Did the location of Governor Pope under the act of Congress affect the claim of Cloyes? On the 15th of June, 1832, 1,000 acres of land were granted to the Territory of Arkansas, to be located by the Governor. This election was not made until the 30th of January, 1833. Before the grant was made by Congress of this tract, the right of Cloyes to a pre-emption had not only accrued, under the provisions of the act of 1830, but he had proved his right, under the law, to the satisfaction of the Register and Receiver of the land office. He had, in fact, done everything he could do to perfect this right. No fault or negligence can be charged to him." The Court quote and sustain

Brown, le-see, *vs.* Clements, (3d How., 666)

"*By the grant to Arkansas Congress could not have* intended to impair vested rights. The grant of the thousand acres and of the other tracts, must be so construed as not to interfere with the pre-emption of Cloyes."

This case was heard on demurrer. But, in remanding the case, the Court give leave to amend the pleadings, that the merits of the case may be fully presented and proven.

Lytle *vs.* Arkansas, (22 How., 193.)

Before reported in 9, How., 314. (See pre-emption, act of 1830.) "Nathan Cloyes entered as an occupant in 1834, under the pre-emption acts of 1830 and 1832." "The same land had been patenten in 1833, by the United States, to John Pope, Governor of Territory of Arkansas," &c.

"Another preliminary question is presented on the record, whether the *adjudication* of the Register and Receiver, which authorized Cloyes' heirs to enter the land, is subject to revision in the Courts of justice, *on proof*, showing that the entry was obtained by fraud, and the imposition of false testimony on these officers as to settlement and cultivation. We deem this question too well settled in the affirmative for discussion. It was so treated in Cunningham *vs.* Ashley, 14 How.; again in Bernard *vs.* Ashley, 18 How.; and conclusively, in the case of Gorland *vs.* Wynn." The Court in this case, go into the whole of the testimony to discover whether or not the requisite improvements were made by Cloyes.

Barnard's heirs *vs.* Ashley's heirs, (18 How., 44.) The Court say:

"According to the conceded facts, it is insisted on the part of Ashley and Craig, that the register and receiver, having, on due proof and examination, rejected Barnard's claim to a preference of entry of the four quarter sections, he is thereby concluded from setting them up in a Court of Equity, because the register and receiver acted in a judicial capacity, and their judgment being subject to no appeal, is conclusive of the claim. And the cases of Jackson *vs.* Wilcox, and Lytle *vs.* State of Arkansas, are relied upon to maintain this position" This is decided not to be the case as contended.

Page 45, the Court say: "In Lytle's case, we declared that the occupant was wrongfully deprived of his lawful right of entry under the pre-emption laws, and the title set up under the election of the Governor of Arkansas was decreed to Cloyes, the claimant, this Court holding his claim to the land to have been a *legal right*, by virtue of the occupancy and cultivation, subject to be defeated only by a failure to perform the conditions of making proof and tendering the purchase money. There the facts were examined to ascertain which party had the *better right*, and following out that precedent, we must do so here." P. 46, The defendants claimed under title from Governor Pope, as Territorial Governor, of date of June 6, 1834. Barnard claimed under act of June 19, 1834, and ocupancy. The Court say: "As Governor Pope's assignees, Craig and Ashley had a vested right when the act of June 19 was passed; it did not operate on these lands, which were appropriated to the use of the United States; and patents for them were properly awarded to purchasers from the Governor."

All the facts and records were examined into, including the validity of the patent, in the language of the Court, "to ascertain which party had the right."

Garland *vs.* Wynn, (20 How., 6)

The Reporter says: "The principal points of law involved in the argument were,

1st Whether or not Wynn could interpose between the United States and the patentee; and 2d, whether the decision

of the officers of the Land-office was not conclusive upon all persons except the United States, and upon them also until the patent was vacated by regular judicial authority" It was held by the Court, upon examination of all the evidence, that Wynn had a better right; that the patent to Garland was wrongfully issued, on the ground also of fraud in obtaining it, by imposing false testimony on the Register and Receiver, and Garland decreed to convey to Wynn.

Irvine *vs.* Marshall, (20 How, 565.)

Marshall, as agent of Barton and Irvine, purchased lands at Government sale, and, with consent of latter, patent was issued to Marshall, agent, the bill stating that Marshall is about to convey the whole to Barton. Held to be a case of resulting trust, over which the United States Courts have an equitable jurisdiction. Massie *vs.* Watts, commented on and affirmed; Wilcox *vs.* Jackson, affirmed.

The Court say: "It has been argued that it is the practice of the officers of the Land-Office, to receive the certificate of purchase, as presenting upon its face the only evidence of title, and that those officers will recognize no other evidence of title but this certificate. Of the practice or the opinion of the officers of the land department, no evidence is exhibited upon this record. But supposing these to be in accordance with the above suggestion, they could by no means control the action or the opinion of this Court in expounding the law with reference to the rights of the parties litigant before them; and this they must do, in accordance with their own convictions, uninfluenced by the opinions of any and every other department of the Government. The reception of the certificate of purchase as evidence of title, may be regular and convenient as a rule of business, but it has not been any where established as conclusive evidence, much less has it been adjudged *to forbid or exclude proofs of the real and just rights* of claimants."

"It is mere justice to the officers of the land department to presume that they would respect the interpretation of the Constitution and laws promulged by those who are appointed as their expositors; but upon a supposition, or even were a conviction of the converse of this, the path of duty here is

plain and direct, and must be followed without hesitancy or deviation."

In this case, the complainant had never presented any claim to the Land-Office, the only proof was intrinsic. Relief granted, Marshall held to be trustee for his benefit, and directed to convey to him.

Burgess *vs.* Gray. (16 How., 48)

Was a claim under an imperfect Spanish grant. The Court shows the difference between these imperfect grants, which, under the treaty, required Congressional action to make them of any avail, and a title under the pre-emption laws. The Court say: "The judgment of the State Court cannot be reversed unless the plaintiff can show that he had a *complete and perfect* title derived from the Spanish or French authorities, or a legal *or equitable* title under the Laws of the United States."

Dubuque & Pacific R. R. Co. *vs.* Litchfield.

Court say: "We concur with the following citation and reasoning of the plaintiff's counsel, to wit: Lord Ellenborough, in his judgment in Geldart *vs.* Gladstone, (1 East., 675.) "If the words would admit of different meaning, it would be right to adopt that which is more favorable to the interests of the public, and against that of the Company, &c The reason of the above rule is obvious; parties seeking grants for private purposes usually draw the bills making them. If they do not make the language sufficiently explicit and clear to pass everything that it is intended to be passed, it is their own fault; while, on the other hand, such a construction has a tendency to prevent parties from inserting ambiguous language, for the purpose of taking, by ingenious interpretation and insinuation, that which cannot be obtained by plain and express terms."

In 1846, Congress granted lands to the State of Iowa to improve the navigation of the Des Moines river. In 1856, Congress granted lands to the State for the construction of a railroad. Held by the Court, that if the purchaser from the State, under the act of 1846, was a purchaser of the land granted in 1846, he had the better title.

Clements *vs.* Warner, (24 How., 394.)

Warner claimed under a purchase a private sale at the land office in November, 1855, and filed his bill to quiet his title.

Clements claimed under a pre emption settlement before in October, 1855, and entry thereon in November, 1855, a year after Warner's entry under sale. The Court say, "The only question presented is whether the land was the subject of a pre-emption right in November, 1855." The Court go into an examination of the facts, and hold the pre-emption title to be the best. The Court say, page 397:

"The policy of the Federal Government in favor of settlers upon public lands has been liberal. It recognizes their *superior equity* to become the purchasers of a limited extent of land, comprehending their improvements, over that of any other person."

By the act of 1841, "the pre-emption privilege in favor of actual settlers was extended over all the public lands of the United States that were fitted for agricultural purposes and prepared for market.

Later statutes enlarged the privilege, so as to embrace lands not subject to sale or entry, and clearly evince that the *actual settler* is the most favored of the entire class of purchasers. No act of Congress has defined the meaning of the term reserve, as applied to lands in these various acts, nor determined explicitly when these alternate sections lose their character as reserves. But all other public lands fitted for agricultural purposes, after they have been offered at public sale, are affected by the privilege of the actual settler to have the preference of entry.

No reason of public policy exists to exclude this class of public lands from the operation of the same law, under the same conditions. No violence is done to the language of the act by limiting the exception to the temporary withdrawal of the lands from the market, and the liberal policy of Congress in favor of the *actual settler is better accomplished by a restrictive rather than an extensive interpretation of the exceptional clause in the act.* We therefore sanction the construction adopted in the land office."

Lyndsey *et al., vs.* Hawes *et al.*, (2 Black, 554.)

Syllabus 1. "This Court will inquire into the facts of a disputed entry of public lands, and set aside or correct the decision of a Register or Receiver,, or of the Commissioner of the General Land Office, *as equity may require.*" Page 555, the Court say as follows:

"In April, 1839, Thomas Lyndsey made application to the *Receiver and Register* of the land office at Galena to purchase the land, claiming a right of pre-emption under the act of 1838, by reason of cultivation and actual residence thereon, and having established his claim to the satisfaction of those officers, he received from them, on the 3d day of June, 1839, the proper certificate, stating the receipt of the purchase money, and that on its presentation to the *Commissioner of the General Land Office*, he would be entitled to a patent. Shortly after receiving this certificate, Thomas Lyndsey removed with his family across the river into Iowa, and died on the 14th of September of the same year, a little more than three months after its date. The present plaintiffs are his heirs, and were all, at the time of his death, either minors or *femes coverts*, except James A. Lyndsey. *No patent ever issued to Thomas A. Lyndsey or his heirs on this entry.*

In 1845, David Haws claimed a pre-emption right under the act of 1841, for the same fractional southwest part of the northeast quarter of section 36, and, in December, received the certificate of the Register and Receiver, that he had purchased and entered it, and on March 1, 1848, received from the Government a patent.

The object of the present suit is to compel from David Hawes and the other defendants, his grantees, a conveyance to plaintiffs of the legal title thus obtained by Haws from the Government. * * * * *

On the 9th of August, 1845, James Shields, Commissioner of the Land-Office, set aside the entry of Lyndsey, ordered his certificate to be canceled, and directed to the Register ann Receiver to hear proof of the right of David Hawes, and to abjudigate his claim.

They accordingly heard his proof and gave him the certificate, on which he afterwards obtained his patent, as before recited. It is claimed by the counsel of Hawes, *that this action of the Land Officers including that of the Commissioner, was a conclusive and final adjudication of the matters now set up in plaintiff's bill, and that the Courts of Law cannot go behind these proceedings to correct any injustice which may have been done to plaintiffs.*

The proposition as thus broadly stated, and as necessarily so stated by defendants counsel to avail him in this case, *cannot be conceded.* It appears from the evidence before us, that the ground on which the Commissioner set aside the entry of Lyndsey, was, that there had been a mistake in the survey made by Bennet in 1833, and that, by order of the Commissioner in 1844, it was ascertained that the house in which Lyndsey resided when he made his claim in 1839, was not on the land for which he received his certificate of entry from the Register and Receiver.

The order for this new survey emanated from the Commissioner of the General Land-Office, June 1, 1844, and the survey was actually made in the autumn of that year, five years after Lyndsey's entry, and five years also after his death, and there is no proof whatever that any of his heirs had notice of this survey, or of any intention on the part of the Commissioner to set aside Lyndsey's entry; but the whole proceedings was *exparte.* It is true, that, subsequently, when the claim of David Hawes to a right to enter this land came before the Register and Receiver, James A. Lyndsey seems to have had some kind of notice; but this was given him in regard to an artempt on his part to enter this land for himself, on a claim of improvement made by himself, having, as is clearly shown, no relation whatever to the right established by his father, Thomas Lyndsey. Nor did the other heirs of Thomas Lyndsey have any notice of the proceedings by which David Hawes established his claim before the Register and Receiver These heirs were not in any sense parties to any of the proceedings, by which the title to the land which their ancestors had bought of the government, was vested in David

Hawes, and their claim annulled. Under these circumstances, we have no hesitation in holding, that the action of the officers of the Land-Office was *not* conclusive upon their rights, and that a Court of Equity may inquire into the *proceedings* by which *the title was vested in Hawes, and afford relief, if proper cause for it is shown to exist.* That this is the settled doctrine of this Court, a reference to a few of its decisions will show.

In the case of *Cunningham vs. Ashley, et al.*, (14 Howard, 377,) Cunningham appeared before the Receiver and Register, and claimed the right under the pre-emption laws, to enter the land which was the subject of controversy. *These officers decided that he had no right to do so, and rejected his claim.* He again and repeatedly presented his claim, and tendered the price of the land His claim received the consideration of the *Commissioner of the Land-Office*, of the *Attorney General*, and of the *Secretary of the Treasury, and was finalty rejected.* The defendaets were permitted to *enter the land*, and receive from the Government *patents* for it. Justice McLean, in delivering the opinion of the Court says, that this final decision of the officers of the Department was the result of twenty years' controversy; and speaking in reference to the plaintiffs rights he says: 'They were paramount to those acquired under the new location. *Those rights were founded on settlement and improvement in* 1821, *and on the acts done subsequently in the prosecution of his claim Having done everything which was in his power to do, the law requires nothing more.*' *Again:* '*So far as the new entries enterfered with the right of complainents, they were void.*' 'The officers of the Government are the agents or the law, they cannot act beyond its provisions, nor make compromises not sanctioned by it.' The Court decreed, that the defendant should convey to Cunningham, who had the paramount equity. In this case, which had been long contested, and had received the consideration of the Receiver, Register, Commissioner, Attorney General, and Secretary of the Treasury, all of whom had concurred in *rejecting* plaintiff's claim, *he had never received any certificate,* NOR ACTUALLY PAID ANY MONEY, yet, the Court held that it would

look into the equities of the case, and set aside the acts of all these officers, because they had erred, to use the language of the Court, both as to the *law and the facts* to the prejudice of complainant. In Barnard's heirs *vs.* Ashley's heirs, (18 How., 43,) this Court again decided, that it would inquire into the facts of a disputed entry, notwirhstanding the decision of the Register and Receiver.

But, the clearest statement of the rule established by this Court on this subject, is to be found in the case of Garland *vs.* Wynn, (50 How, 8.) Wynn's entry, which was the elder, had been set aside, and the *money refunded*, and a patent certificate awarded to Hempbill, who assigned to Garland, to whom the patent issued. Wynn brought his suit in equity to compel from Garland the conveyance of the legal title, on the ground that these proceedings were illegal, and that he had the equitable right. Garland insisted that *the Circuit Court had no authority or jurisdiction to set aside or correct the decision of the Register or Receiver, and that their adjudication was conclusive.* Mr. Justice Catron, in delivering the opinion of the Court, says: 'The general rule is that, where several parties set up conflicting claims to property, with which a special tribunal may deal, as between one party and government, regardless of rights of others, the latter may come into the ordinary courts of justice, and litigate the conflicting claims. Such was the case of Comegys *vs.* Vasse, (1 Peters, 212,) and the case before us belongs to the same class of *ex parte* proceedings. Nor do the regulations of the Commissioner of the General Land Office, whereby a party may be heard to prove his better claim to enter, oust the jurisdiction of the courts of justice We announce this to be the settled doctrines of this Court.'

In Lyttle *et. al.*, *vs.* State of Arkansas *et. al.*, (22 How., 192,) the same member of the Court, delivering its opinion, says: "Another preliminary question is presented on this record, namely: whether the adjudication of the Register and Receiver, which authorized Cloys' heirs to enter the land, is subject to revision in Courts of justice, on proof showing that the entry was obtained by fraud, and the imposition of false testimony

on those officers as to settlement and cultivation. We deem this question too well settled in the affirmative for discussion." We are not now disposed to question the soundness of these decisions, and they clearly dispose of the objection raised by defendants on this branch of the case.

We now proceed t inquire into the grounds upon which the entry of Thos. Lyndsey was set aside, and the application of David Hawes to enter the same land was allowed."

O'Brien *vs.* Perry, 1 Black, 132.

3. "Where a person whose right to pre-emption was founded on his relinquishment of an *undetermired* claim under France or Spain, has entered the land according to the act of 1832, and the Land-Office *cancelled his enlry* and *issued a patent* to another person for the same land; the *patent* and the *cancellation* of the entry are both void."

"This action was brought by the plaintiff, O'Brien, to recover possession of a part of section 15, township 37. He claimed title under a patent of the United States, dated May 4, 1854, which was founded upon a pre-emption certificate under the act of 1841, dated July 3, 1847. His possession or settlement began in April, the same year. The title which the defendants set up, began as early as 1795; under Basil Valle, &c In 1807, Perry, assignee of Valle, presented the claim to the Board of Commissioners, and no decision was had by it until 1811, when it was rejected. In 1833 the claim was again presented to the Board of Commissioners, nder the aci of 1832, but no decision was had. In 1834. Perry relinquished all right and title to the United States, and afterwards applied to the Register and Receiver to make his entry as purchaser of the tract under the act of 1832, which was permitted in 1839. Under the sanction of the Commissioner of the General Land-Office in May, 1843, the entry was canceled by the then Commissioner, and his decision affirmed by the Secretary of the Treasury.

Held by the Court, after a full examination of the evidence in the case, that the cancellation was illegal and void, and the subsequent entry by O'Brien and his patent were void;

and the Court say: "This was so held in Lyttle *vs.* State of Arkansas, 9 How., 314; Cunningham *vs.* Ashley, 14 How., 377, ann Minter *vs.* Crommelin, 18 How., 87.

Rice *vs.* R R. Co (1 Black, 358.) "If Congress passed an act granting public lands to a Territory to aid in making a railroad; and if, by the true constauction of the act, the Territory acquired any *beneficial interest* in the lands, as contra distinguished from a *mere naked trust or power to dispose of them for certain specified uses and purposes, the act is irrepealable, and a subsequent act attemytiug to repeal it is void, &c.*

Edmund Rice brought trespass against the railroad company for cutting timber on section 15, township 114, north of Range West.

The defendants were incorporated by the Legislature of Minnesota Territory on the 4th March, 1854, and the charter provided that any lands that might be thereafter granted by the United States to the Territory in aid of the road, "are hereby granted in fee simple to the road, and, on the 1st and 20th of May, the subscription books of the company were opened, and the charter accepted. On the 29th June, 1854, nearly four months afterwards, Congress granted the land to the Territory for the purpose of aiding in building a railroad, *hereafter* to be organized and constituted. On the 29th day of Augusl, 1854, two months after the passage of the act, it was repealed. On the 16th day of February of the following year, 1855, the Legislature of the Territory re-enacted the charter, and, on the following October, the Railroad Company surveyed their route In conformity with the act of Congress—which, however, was repealed.

392, The Court say, "repealed, as the act was at the same session in which it was passed; the defendants had not then procured the amendments to their charter set up in their answer, nor had they then commenced to *survey*, locate, or construct the railroad therein authorized and described; they had completed the organization of the Company under their original charter at the time and in the manner already mentioned, but they had done nothing more which could have the

remotest tendency to secure to them any right, title, or interest in the lands described in the complaint."

373, Briefly stated, the questions are as follows:

"First. Whether the defendants acquired any right, title, or interest in the lands in controversy by virtue of the provisions in their charter, as *originally granted* by the Territorial Legislature, and if not, then,

"Secondly. Wether the Territory, as a municipal corporation, by the true construction of the act of Congress set up in answer, acquired under it any *beneficial interest* in the same, as contra-distinguished from *a mere naked trust—a power* to dispose of the land in the manner and for the use and purposes described in the act?

Argument is not necessary to show that those questions arise in the case, because, if the defendants *acquired such a right, title, or interest in the lands under their original charter, then it is clear that it became a vested interest* as soon as the act of Congress went into effect; and on that state of the case it would be true, as contended by the defendants, that the repealing act set up in the replication of the plaintiff is void, and of no effect. Tenet *vs.* Taylor, (8 Cranch 43;) Pawlett *vs.* Clark, (9 Cranch, 292.")

But the determination of that question in the negative does not necessarily show that the plaintiff is entitled to prevail in the suit; because, if the legal effect of the act of Congress set up in the answer was to grant to the Territory a beneficial interest in the lands, then it is equally clear that it *was not* competent for Congress to pass the repealing act and divezt the title; and the defendants, on the facts exhibited in the pleadings, although they did not acquire any title under their original charter, nevertheless are the rightful owners of the land by virtue of the amendment to the same, passed by the Territorial Legislature. Unless, therefore, both of these questions are determined in the negative, the judgment of the court below must be affirmed. (Fletcher *vs* Peck, 6 Cranch, 135.)

1st. 374,5, the railroad acquired no right, title, or interest in the lands by virtue of their original charter, because the

title was not in the Territory at the time it was made, (the act being repealed.

2d. 376–7–8, Under section first, the lands were to be held by the Territory for the use and purpose of constructing the railroad described in the act, and applied to that purpose and no other." Under section second, "Such disposal of the Territory," "no such authority was conferred in the act of Congress granting the land; whether we look at the language to be employed, or the purpose to be accomplished, or both combined, the conclusion is irresistible, that it was by *future* action *onlo*, that the legislature was authorized to dispose of the lands even for the purpose therein described." Upon a construction of the act the Court say, that no title passed to the State, and no *beneficial* interest, but a *mere naked* trust, which, if not executed by the State, could be repealed.

Lessien *et. al. vs.* Price (12. How. 76,) commented on and confirmed.

Steamship Co. *vs.* Joliffee, 1 syllabus and pages 456, 457 and 458. 2 Wallace.

"Where a pilot has tendered his services, and they have been refused under the laws of California—hereby declared constitutional, he is entitled to receive half fees, and an act repealing the law could not affect the vested right. "There are many cases in which an offer to perform, accompanied by present ability to perform, is deemed by law equivalent to performance. In Steamship case, Justices Miller, Wyyne and Clifford dissented, on the ground that this was not a contract, but a penalty for the violation of the statute, and that a repeal was not unconstitutional.

United States *vs.* Stone, 2 Wallace, 535. "Nor is fraud in the patentee the only ground upon which a bill will be sustained. Patents are sometimes issued *unadvisedly*, or by mistake, where the officer has no *authority* to grant them, *or where another party has a higher equity*, and should have received the patent. The patent is but evidence of a grant, and the officer who issues it acts *ministerially*, and not judicially;" "and although no *fraud* is charged in the bill, we have no

doubt that such a proceeding in chancery is the proper remedy, and that if the allegations of the bill are supported, that the decree of the court below, cancelling the patent. should be affirmed." The action of the Land Officers being ministerial and not judicial, their cancellation of a patent would be void.

1 Wallace, 109, State of Minnesota *vs.* Batchelder, pre-emption act, 1841.

Page 115, the Court say: "The Court below refuse to give any effect to these facts as set forth in the pleadings, &c., &c, and the ground taken to uphold these rulings is, that *the decision of the Register and Receiver, and certificates issued*, were conclusive on the Court, and not revisable or to be inquired into; and that the remedy of the party aggrieved was by an application to the Commissioner of the General Land Office. These questions have been so often decided before this Court, and were so fully considered in the last case, (Lyndsey *et al.*, *vs.* Hawes,) where the authorities are collected, that it would be a waste of time to re-examine them. A Court of Equity *will* look into the proceedings before the *Register and Receiver*, and even into those of the Land-Office or other offices where the right of property of the party is involved and *correct errors of law or of fact* to his prejudice."

D. S. Walker
for Appellees

IN THE

Supreme Court of the United States.

December Term 1869.—No. 101.

JOHN B. FRISBEE, APPELLANT,

VS.

L. H. WHITNEY, APPELLEE.

BRIEF OF

F. P. STANTON,
GEO. W. JULIAN,
AND
BENJ. F. BUTLER,

FOR APPELLEE.

GIBSON BROTHERS, PRINTERS.

LANDS in California, claimed under Mexican grants which were finally rejected, were always part of the public domain; that is to say, since they were ceded to the United States by the treaty of Guadaloupé Hidalgo. There is no law reserving them from sale. The decision of the final tribunal against any private claim to such lands only removed a cloud upon the title which the Government held from the beginning. The 13th sec. of the act of 1851, (9 Stat., p. 633,) which enacts that upon such decision they shall be considered "a part of the public domain," is only declaratory of a fact existing independent of that enactment.

In March, 1862, when this court pronounced the claim of General Vallejo to the Soscol Ranch to be void, the land had not been surveyed; but in the summer of that year Congress passed two acts, making unsurveyed lands in California subject to settlement and pre-emption. (See Acts of 1862, ch. 86, 7th sec., and ch. 94, sec. 1.) One of these acts was passed on the 30th May, and the other on the 2d June; and the 10th section of the former authorized the settlers in any township to cause the lands to be regularly surveyed by paying the cost of the work to the surveyor general of the United States.

There is no uncertainty as to the construction of these laws. They authorized any qualified citizen to claim a pre-emption by occupying the land and complying with the prescribed conditions. Mr. Whitney, the plaintiff below, settled on and improved that part of the land now in dispute, and fully performed all the requirements of the law. He, therefore, had the right to enter the land at the minimum price.

It is insisted, however, that, at this time, Frisbee was in possession of the land, and that Whitney had no right to occupy it with a view to claim a pre-emption. The statement of the register and receiver is quoted to the effect that the land was "in the actual possession of, and under culti-

vation by, John B. Frisbee." The statements of this report being only the conclusions of the register and receiver from evidence submitted, are not in themselves evidence, and are not to be considered by the court.

Now, it is certain that the testimony taken before the local officers, as the same appears in the record, (p. 13 to 16,) shows their statement to be wholly unsustained; while the witnesses examined in the court below prove it to be altogether untrue.

The bill charges that Frisbee never lived on the land, (p. 2,) and this is not denied in the answers. The fact is proved by all the witnesses. (See Record, pp. 51, 52, 55, 59.) There was a tract of fully 1,000 acres claimed by Frisbee, on which there were some fences and some shanties for renters; but the fences were down when Whitney made his settlement, and teams were passing and repassing "from the American Cañon road to the Napa road."

This land, then, being a part of the public domain, it is unnecessary to say that Mr. Frisbee could lawfully hold no more than one quarter-section, and that only by personal occupation with a view to pre-emption. He had no right to rent any portion of it.

Under the provisions of the act of 30th May, 1862, above quoted, the settlers in this township had paid their money to the surveyor general, and procured the lands to be surveyed in order that they might prove up their pre-emptions and secure their homes. But Mr. Whitney settled in October, after the field-work had been finished, but before the plats had been returned. The law allowed him to settle on unsurveyed lands; but the subdivisions had been established on the ground by the proper officers of the United States, and he was invited by these legal surveys to regard the land as open to settlement and pre-emption. These facts are fully established by the documents found in the record, page 65 to 77.

It is now objected, that Mr. Whitney did not perfect his claim by filing his declaratory statement, and proving his

settlement to the satisfaction of the register and receiver. The proof is, that he did file his declaratory statement, (p. 62,) and this is uncontradicted, though the paper has been suppressed. But these omissions, if such they can be called, are fully explained by the facts shown in the record, pages 11 and 12.

At the instigation of Frisbee, or at least in his interest, on the 13th January, 1863, after the surveys had been completed, but before the plats had been returned, the Commissioner of the General Land Office telegraphed the surveyor general to "stay proceedings," and not to act "in regard to Soscol." The surveyor general replied, on the same day, "proceedings in survey of Soscol suspended."

On the 29th of the same month the Commissioner again telegraphed the surveyor general to the effect that declarations could only be filed after the return of the plats; and on the same day he wrote a letter of instructions embodying the same view, and directing the local officers not to receive declaratory statements or to hear proofs until the plats should be returned, he having previously ordered the plats to be withheld.

Such are the facts of this case; there is no dispute about them, for there is no contradictory testimony whatever. It was in the midst of these occurrences that Congress passed the act of March 3, 1863, (12 Stat., p. 808,) entitled "An act to grant the right of pre-emption to certain purchasers on the Soscol Ranch, in the State of California."

It is important to observe that this act does not assume to disturb the decision of the Supreme Court which adjudged the Soscol grant to be void. On the contrary, recognizing the land as "part of the public domain," it simply authorizes certain purchasers from Vallejo to enter the lands at the minimum price; to purchase from the United States at the same consideration required of pre-emptors and others.

Two questions arise upon this law in connection with the facts established in the record: First, one of construction—whether Congress *intended* to repeal the general pre-emption laws and to disregard the rights of citizens who had made

bona fide settlements under them; and, secondly, whether, if such was the intention, Congress had the power to take from the settlers their vested rights in the premises.

As to the first of these questions, we refer to what the court says in United States *vs.* Arredondo, (6 Peters, 738, 739:) "A government is never presumed to grant the same land twice, (7 J. R., 8.) Thus a grant, even by act of Parliament, which conveys a good title against the king, takes away no right of property from any other; though it contains no saving clause, it passes no other right than that of the public, though the grant is general of the land," &c., &c.

So, also, in Steamship Co. *vs.* Jolliffe, (2 Wallace, 457,) this court said: "Where a right has arisen upon a contract, or a transaction in the nature of a contract, authorized by statute, and has been so far perfected that nothing remains to be done by the party asserting it, the repeal of the statute does not affect it on an action for its enforcement. It has become a vested right, which stands independent of the statute."

The right which we assert now, and which we claim has been perfected under the general pre-emption laws, is *the right to pre-empt the land* which Mr. Whitney has occupied and improved—the right, which the Government is pledged by law to allow, of a preference of entry at the minimum price. We have not perfected the entry, it is true, because, as already shown, we have not been permitted to do so, even after our right had fully accrued. It is not to be presumed that Congress intended, by the special act of 1863, to take away this right. There are no words of repeal, nor any necessary repugnance or inconsistency of provision with regard to the general pre-emption laws; and upon every established principle of construction, there can be no implied repeal of those laws, nor any implication of hostility to the rights acquired under them.

The act of 1863, allowing a preference of entry to the Soscol purchasers, must be construed in connection with the existing laws on the same subject, and must be made, if possible, to harmonize with them. The obvious solution of

the difficulty is, to construe the law as giving Frisbee, and others in the same category, the right to enter only that part of the land which had not been appropriated by any valid claim under pre-existing laws.

As to the second point, above stated, whether, even if Congress *intended* to take away the rights of pre-emptors, that intention has been or can be accomplished by any legislation, it is scarcely more than necessary to refer to the numerous authorities quoted in the brief of Gen. D. S. Walker, now on file.

We do not deny that Congress, if disposed to commit an act of great perfidy, could repeal all the pre-emption laws, and prohibit the Land Office from allowing any entries under them. There would be no power to compel the Government to issue any titles.

But, fortunately, the question does not arise in that form; for in this case the Government has issued the title to another person, and what we insist upon is, that the Government has no power, by any legislation whatever, to take away or destroy the equity of the citizen who has acquired a right to enter a part of the public lands, by complying with the conditions and claiming the benefits of the pre-emption laws. The question is between two citizens, one of whom has acquired an unjust advantage over the other. It matters not whether this be by act of Congress, or by the illegal act of the executive officers. In either case, according to repeated decisions, the courts will redress the wrong. In addition to the authorities quoted in Gen. Walker's brief, we refer to—

United States *vs.* Stone, 2 Wall., 535.
Stark *vs.* Starrs, 6 Wallace, 402.
Silver *vs.* Ladd, 7 Wallace.

The plaintiff in error, in the brief recently filed by his counsel, quotes a number of authorities to sustain his position that the suit pending in California, of which he presents the record, ought to be effectual in bar of this. Supposing

that he had properly pleaded the prior suit, there are two fatal objections which his authorities do not meet at all:

First. It is well settled that a suit pending in the courts of one State cannot be pleaded in abatement, even much less in bar, of an action pending in the courts of another.

Second. Even when the prior suit is pending in such a jurisdiction, that it may be pleaded in abatement it is necessary not only that it be between the same parties and for the same cause of action, but it must be by the same plaintiff against the same defendant. A party cannot be compelled to file a cross-bill in a suit commenced by his adversary, but he may commence his independent action for affirmative relief in any court which has the jurisdiction to give the necessary relief. The following authorities fully cover both these points:

Mitchell *vs.* Bunce, 2 Paige, 606.
Salmon *vs.* Wooten, 9 Dana, 423.
Brown *et. al. vs.* Joy, 9 Johnson, 219.
Walch *vs.* Durkin, 12 " 99.
Cook *vs.* Litchfield, 5 Duer, 330, 342.
Williams *vs.* Ayrault, 31 Barbour, 364.
Hatch *vs.* Spofford, 22 Connecticut, 485, especially p. 497-8.
Ayres *vs.* Beverley, 32 Cal., 620, especially p. 629-30.
Certain logs of mahogany, 2 Sumner, 589.
Medley *vs.* Veazie, 3 Sumner, 165.
N. E. Screw Co. *vs.* Bliven, 3 Blatch. C. C. R., 249.
Yelverton *vs.* Conant, 18 New Hampshire, 123.
Smith *vs.* Lathrop, 44 Pennsylvania, 326.
Eaton *vs.* Hunt, 20 Indiana, 467.
White *vs.* Whitman, 1 Curtis C. C., 494.
Lyman *et. al. vs.* Brown *et al.*, 2 Curtis C. C., 559.

There is very little conflict of authorities, and others might be quoted, but these are sufficient to settle the question.

BENJ. F. BUTLER,
GEO. W. JULIAN,
FRED. P. STANTON.

No......

IN THE SUPREME COURT

OF THE

STATE OF CALIFORNIA.

ROBERT T. HUTTON,

Plaintiff and Appellant,

VS.

JOHN B. FRISBIE, ET ALS.

Defendants and Respondents.

TRANSCRIPT ON APPEAL.

Patterson, Wallace & Stow,
Attorneys for Defendants and Respondent

Thompson Campbell, John B. Felton, & T. H. Hittell,
Attorneys for Plaintiff and Appellant.

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TRANSCRIPT ON APPEAL.

COMPLAINT.

2 *In the District Court of the Twelfth Judicial District of the State of California, in and for the City and County of San Francisco.*

ROBERT T. HUTTON,

vs.

JOHN B. FRISBIE, E. FRISBIE, J. B. THOMAS, C. J. MOSELEY, ISAAC M. RUTON.

Robert T. Hutton, the above named plaintiff,
3 complains of John B. Frisbie, E. Frisbie, J. B. Thomas, C. J. Moseley, Isaac M. Ruton, the above defendants, and for cause of complaint alleges:

That heretofore, to wit: on the 16th day of November, A. D. 1862, he, the said plaintiff, entered and settled upon a certain tract of land known and described as follows, that is to say: the southwest quarter of section numbered twenty-five, (25) in township numbered four (4) north,

4 in range numbered four, (4) west of Mount Diablo meridian and base, the same being in the County of Napa, and State of California.

That at the time of said entry and settlement the said tract of land was a part of the public domain of the United States, and subject, under the laws thereof, to the right of entry, settlement and pre-emption, of the said plaintiff.

5 That the said plaintiff then was, and still is, a citizen of the United States, over the age of twenty-one years; that he is not, and never was, nor ever claimed to be, entitled to more than one pre-emption right under the laws of the United State; that at the time of said entry and settlement he had never had the benefit of any right of pre-emption under any law of the United States; that he was not then, nor has he since been, nor is he now, the proprietor or owner of
6 three hundred and twenty acres of land in any State or Territory of the United States; that he did not quit or abandon his residence on his own land to reside on the public land; that he did not enter, or settle upon, or improve, nor hath he settled upon or improved said above described tract of land to sell the same on speculation, but that he entered and settled upon and improved the same in good faith, to appropriate it to his own exclusive use and benefit.

That said above described tract of land was not, nor is it, included in any reservation by any treaty, law, or proclamation of the President of the United States, nor reserved for salines, or for other purpose or purposes; that the said plaintiff was in all respects qualified and competent to enter and settle upon and pre-empt the same, and that he did, as aforesaid, at the time aforesaid, enter and settle upon said above described quarter section of land, *bona fide,* under the pre-emption laws of the United States, with a view to enter the same and acquire a patent therefor under said laws.

That the said plaintiff, after his said entry, to wit: on or about the 16th day of November A. D. 1862, erected a dwelling-house upon said premises, and moved into the same and resided in the same from that time until afterwards, to wit: on the 1st day of December, 1862, when he was forcibly and with strong hand ejected by the procurement of the defendants; and said plaintiff further avers that ever since being ejected from said premises as aforesaid, he has been and still is deterred by threats and fears of bodily harm from continuing his settlement and improvements upon said premises.

That said above described tract of land is part of the tract formerly known as the "Suscol

Ranch," which was claimed, under a pretended Mexican grant, by M. G. Vallejo; that said pretended grant was investigated by the Commission appointed under and by virtue of an Act of Congress, entitled "An Act to ascertain and settle the private land claims in California," approved March 3d, 1851, and also by the Courts of the United States; that on a final investigation the Supreme Court of the United States, by its final decision and decree, duly entered on the 24th day of March, A. D. 1862, adjudicated and declared said pretended grant to be utterly void; and that, by virtue of said final decision and decree, and of said Act of March 3d, 1851, and of other Acts of Congress, the whole of said land known as the "Suscol Ranch" was, and was declared to be, and became, a part of the public domain of the United States, and subject to settlement and pre-emption; and the said tract of land above described was, and became, subject to the right of the plaintiff to enter and settle upon and improve the same as aforesaid, and to pre-empt the same, and on compliance with the pre-emption laws of the United States, to obtain a patent therefor.

That the said plaintiff, at the time of his said entry, was, and has ever since been, ready and willing and anxious to comply in all respects with all the requirements and conditions of the said pre-emption laws; that he has, *bona fide*, offered

13 and tendered a compliance therewith; that on or about the 1st day of September, A. D. 1862, he, in connection with other pre-emption settlers in said township hereinbefore described, desiring a survey to be made of the same, paid in the proper United States depository, to the credit of the United States, a sum sufficient to pay for such survey, together with all expenses incident thereto, without cost or claim for indemnity on the United States, as required by the Act of Con-
14 gress, entitled "An Act to reduce the expenses of the survey and sale of public lands," approved May 30th, 1862; that at their request said surveys were made and the plats thereof were completed and ready to be returned to the Local Land Office of the United States of the proper district, before the 1st day of January, A. D. 1863.

15 That after said plats of surveys were ready to be returned as aforesaid, the defendants, who claimed to be purchasers from said M. G. Vallejo of a large portion of said tract of land, known as the "Suscol Ranch," including the portion thereof hereinbefore described, and which was settled upon and claimed under the pre-emption laws of the United States by the plaintiff, as aforesaid, fraudulently conspiring with others to defeat the plaintiff's rights to said above described tract of land, and by false and fraudulent representations,

16 procured the Commissioner of the General Land Office at Washington to order the Surveyor General of the United States for California to withhold the said plats of survey, and not return the same to the Local Land Office aforesaid, which said order was thereupon, to wit: on the 13th day of January, 1863, without authority of law made and transmitted by said Commissioner to said Surveyor General; and said plats were thereupon withheld and not returned; and also pro-
17 cured said Commissioner to instruct the Register and Receiver at the said Local Land Office that no declaratory statement under the pre-emption laws of the United States could be filed by, or should be received from, the plaintiff until after the return of said plats of survey, which said instruction was made and transmitted to said Register and Receiver on the 29th day of January, 1863; and the plaintiff charges that, by reason thereof and of said fraudulent doings of said
18 defendants, he was prevented from entering and paying for said above described tract of land, as he had a legal right to do, and as he was ready and willing and anxious to do; and he further charges that, but for said order, procured by the false and fraudulent doings of said defendants, and others conspiring with them, as aforesaid, he would immediately and before the 3d of March, 1863, have entered and paid for said above described tract of land, and fully complied with all

19 the requirements of said pre-emption laws, and would have obtained a patent thereto.

That afterwards, on the 3d day of March, 1863, the Congress of the United States, at the solicitation of the defendants, and other persons claiming to be purchasers from M. G. Vallejo, passed a special Act, entitled "An Act to grant the right of pre-emption to certain purchasers on the Suscol Ranch, in California," approved March 3d,
20 1863; that after the passage of said last mentioned Act, the said Commissioner issued instructions to said Register and Receiver to investigate and report the facts as to the settlement of the various claimants of the said tract of land, known as the "Suscol Ranch," including that of the plaintiff, as aforesaid; that in accordance with said instructions, said Register and Receiver did take testimony and report the same to said Commissioner at Washington; that on said investiga-
21 tion the piaintiff made proof, to the satisfaction of said Register and Receiver, of his entry and settlement upon, and improvement upon said above described tract of land, in accordance with said pre-emption laws, and in full compliance therewith; but that notwithstanding the premises, said Register and Receiver returned it as their opinion that said special Act of March 3d, 1863, withdrew retroactively from the operation of said pre-emption laws the said above described tract of land,

and for that reason alone refused to permit the plaintiff to proceed any further in the establishment of his pre-emption rights to said land.

That previous to said last mentioned instructions being given, to wit: on the 16th day of September, A. D. 1863, the plat of the public survey of said township was filed in the said Local Land Office and with the Register thereof; and within ninety days thereafter, to wit: on the 17th day of September, A. D. 1863, the plaintiff duly filed with said Register his declaratory statement, according to law, showing his said entry and settlement upon said above described tract of land, and his claim to a pre-emption right to the same; and afterwards, to wit: on the 26th day of June, A. D. 1864, upon the said investigation by said Register and Receiver, full and complete proofs of his right to a pre-emption of said land were duly taken by said Register and Receiver, to their satisfaction, showing that said plaintiff was entitled to enter said land under the pre-emption laws of the United States, which said proofs, so taken, were returned by said Register and Receiver to the said Commissioner at Washington, in whose department the same are now on file; and that upon said investigation the plaintiff duly filed all the affidavits and proofs required by law, paid the said Register and Receiver their fees, in gold or silver coin, for taking proofs and affidavits and

25 filing the same, and did and performed all the duties required to be performed, and then was, and has since continued to be, and still is, ready and willing and anxious to pay the price required by law for said land, and all other proper charges and fees, to entitle him to a patent thereof under said pre-emption laws.

That the said above described tract of land was, by the pre-emption laws of the United States, duly
26 appropriated and withdrawn from the mass of the public lands at and prior to the passage of said above mentioned special Act of Congress of March, 3d, 1863, by virtue of the several acts of settlement made by the said plaintiff as hereinbefore set forth and was not subject to entry by any person except the plaintiff, and that the same was not liable to be dealt with by Congress, at the passage of said Act, as a part and portion of the
27 public lands, but was subject only to the rights of the plaintiff, as a pre-emptioner thereof.

That after the taking and filing of the proofs of pre-emption, as aforesaid, the said Register and Receiver refused to allow the said plaintiff to enter the said above described tract of land, and declared as they had previously declared, that they would not receive any money tendered for said lands, or recognize any steps to be taken by said plaintiff to pre-empt said land; and that the

said plaintiff, notwithstanding said declarations, did make a tender of the moneys for the entry of said land, which was refused; but plaintiff alleges and avers that he was, at all times after the said tract of land was surveyed and the plats returned to the said Local Land Office, and is still, ready and willing and anxious to pay the sum of money required by law for the entry of said tract of land, and in all respects fully to comply with the pre-emption laws in regard thereto.

That after said investigation was made and said proofs reported and returned by said Register and Receiver, as aforesaid, the said defendants as purchasers from said Vallejo, under said special Act of March 3d, 1863, entered and are about to receive a patent for the said above described tract of land, to which, in right and justice, the plaintiff only is entitled under the laws of the United States as aforesaid.

And the said plaintiff further alleges, and so charges the fact to be, that at the date of and prior to his said entry, defendants had both actual and constructive notice of his, the said plaintiff's, claims and rights to said land, and that said entry thereof by said defendants was and is in fraud of the legal and equitable rights therein and thereto of said plaintiff.

31 That the said defendants have not, nor has either of them, ever resided on the above described tract of land, and had made no "settlement" upon the same, within the meaning of said special Act of March 3d, 1863, at the time of said adjudication by the Supreme Court of the United States.

That the said defendants on account of the premises, will, unless restrained by this Honor-
32 able Court, be able to execute conveyances of and sell the same to innocent purchasers, and wholly defeat the just claims and rights of the plaintiff, and deprive him of the home which he has, as aforesaid, entered and settled upon and improved, under the guaranty of the laws of the land; all of which defendants threaten to do.

Wherefore, in consideration of the premises, and because the plaintiff has no remedy at law, he
33 prays that the defendants, and each of them, may be enjoined and restrained from conveying and selling said land, or any part thereof; that the defendants, and each of them, may be declared to hold the same in trust for the plaintiff, and may be compelled to convey the same to the plaintiff upon the payment of the purchase money required by law, with the proper costs and charges and interest thereon; and restore the possession thereof to the plaintiff; and for such other and

34 further relief as may seem meet and proper in the premises.

THOMPSON CAMPBELL,
JOHN B. FELTON,
THEODORE H. HITTELL,
Attorneys for Plaintiff.

STATE OF CALIFORNIA,
35 County of Solano. } ss.

Robert T. Hutton, being duly sworn, deposes and says, that he is the plaintiff above named; that he has heard read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief, and as to those matters he believes it to be true.

ROBERT T. HUTTON.

36

Subscribed and sworn to before me, this Aug. 1st, A.D. 1867.

CHAS. W. RILEY,
[SEAL.] Notary Public.
Vallejo, Solano County, California.

Filed September 13th, 1867.

37

DEMURRER.

[*Title of Court and Cause.*]

Defendants demur to plaintiff's complaint, and specify as grounds of demurrer:

First.--That said complaint does not state facts sufficient to constitute a cause of action.

(*a.*) It is not averred in said complaint that the lands therein described, were, on the 16th
38 day of November, 1862, or at any time subsequent to that date, vacant or unoccupied lands.

(*b.*) It is not averred in said complaint what acts defendants did, nor what representations defendants, or defendants and others, made to procure, or by which they, or they and others, procured the Commissioner of the General Land Office to order the Sur-
39 veyor General of the United States for California to withhold the said plats of survey, and not return the same to the Local Land Office.

(*c.*) It is not averred in said complaint what representations were made or acts done by defendants to procure said Commissioner to instruct the Register and Receiver as averred in plaintiff's complaint.

40 (*d.*) It is affirmatively averred in said complaint that plaintiff did not, prior to March 3d, 1863, pay or tender, and has not paid or tendered to the United States Government, or to any officer thereof, any money in payment for said lands.

(*e.*) It appears from said complaint that said lands were, by Act of Congress, withdrawn from pre-emption and settlement before
41 plaintiff had acquired any legal or equitable estate therein and thereto, and granted to others, to wit: *bona fide* purchasers under M. G. Vallejo, or his assigns, to the extent to which the same had been reduced to possession by such purchasers prior to March 24th, 1862.

(*f.*) It affirmatively appears from said complaint that pursuant to § 4 of chap. cxvi, of
42 a law of Congress, passed March 3d, 1863, the claim of defendant to enter said lands and obtain a patent therefor, and the adverse or pre-emption claim of plaintiff was submitted to, passed upon, and adjudicated upon by said Register and Receiver, and by the Commissioners of the General Land Office.

Second.—That the Court has no jurisdiction of the subject matter of this action.

43 Third.—That the plaintiff's complaint is ambiguous.

Fourth.—That the plaintiff's complaint is unintelligible.

Fifth.—That the plaintiff's complaint is uncertain.

PATTERSON, WALLACE & STOW,
Attorneys for Defendants.

Filed September 30th, 1867.

44

JUDGMENT.

[*Title of Court and Cause.*]

This cause came on to be heard and tried upon the complaint and the demurrer thereto of defendants, and the same having been argued by counsel for the respective parties, and the Court having duly considered the same, and entered its order sustaining said demurrer on the ground that the complaint does not state facts sufficient
45 to constitute a cause of action, and the Court having given plaintiff leave to amend his complaint, and it being made to appear to the Court by affidavit that the plaintiff declined to amend his complaint, and has failed to avail himself of such leave.

It is, on motion of Patterson, Wallace & Stow, attorneys for defendants, ordered and adjudged that the plaintiff is not entitled to any judgment or relief against defendants, by reason of any or

46 all of the facts, matters and things set out in plaintiff's complaint.

And it is further adjudged and decreed that plaintiff take nothing by his said complaint, and that the defendants, John B. Frisbie, E. Frisbie, J. B. Thomas, C. J. Moseley, Isaac M. Ruton, recover against plaintiff, Robert T. Hutton, their (said defendants') costs of this action, amounting to the sum of $ and that defendants have execution therefor against the property of the
47 plaintiff.

Judgment recorded March 4th, 1868.

NOTICE OF APPEAL.

[*Title of Court and Cause.*]

You will please take notice that the plaintiff in the above entitled action hereby appeals to the Supreme Court of this State, from the judgment
48 therein made and entered in the said District Court, on the 15th day of February, A D. 1868, in favor of said defendants, against said plaintiff, and from the whole thereof.

Dated San Francisco, this 21st day of February, A.D. 1868. Yours, etc.,

THOMPSON CAMPBELL,
JOHN B. FELTON,
T. H. HITTELL,
Att'ys for Appellant.

49 To the Clerk of said District Court, and Messrs. PATTERSON, WALLACE & STOW, Attorneys for Respondents.

Filed February 21st, 1867.

Due service after filing admitted by defendants' attorneys.

STIPULATION.

50

[*Title of Court and Cause.*]

It is hereby stipulated and agreed, by and between the parties hereto, that the appeal in the above cause has been regularly and duly perfected, and that the foregoing Transcript is correct, and shall constitute and be the Record on Appeal in said cause.

San Francisco, March 10th, 1868.

51 THOMPSON CAMPBELL,
JOHN B. FELTON, and
T. H. HITTELL,
Attorneys for Plaintiff.

PATTERSON, WALLACE & STOW,
Attorneys for Defendants.

52

OPINION.

HUTTON *vs.* FRISBIE. } July Term, No 1,636.

The questions arise upon demurrer to the complaint. The following and other subordinate facts are alleged. These allegations, for the purposes of our decision, must be assumed to be true.

On the 24th of March, 1862, the claim to the
53 Suscol Rancho, under the Mexican grant to Vallejo, was rejected by the Supreme Court of the United States, and thereafter till the passage of the Act of 1863, hereinafter considered, the lands embraced in said rancho, for the purposes of this decision, will be regarded as a part of the public domain of the United States to which the pre-emption laws applicable to the Sta e of California extended. On the 16th of November, 1862, the plaintiff entered upon the southwest
54 quarter of Section 25, Township 4 north, Range 4 west, of Mount Diablo meridian and base, being in the county of Napa and a part of said Suscol Rancho claimed under said grant. He claimed a pre-emption right under the laws of the United States, and being competent to acquire such right, performed and offered to perform all the conditions prescribed by those laws, so far as they could then be performed. Some two weeks afterward, on the 1st of December, 1862, he was

55 ejected from said premises, by force by the defendants, who are purchasers under Vallejo, and he has since been deterred by threats from continuing his settlem nt and improvements.

On the 3d of March, 1863, Congress, at the solicitation of defendants and other purchasers from Vallejo, the grantee in said rejected grant, passed a special Act, entitled "An Act to grant the right of pre-emption to certain purchasers on the Suscol Rancho in California." Under this
56 Act, the Register and Receiver of the Land Office took testimony as to the settlement and right of pre-emption of the several parties, including plaintiff, and determined their rights; and, on appeal, the Secretary of the Interior finally decided that the said Act of March 3d, 1863, withdrew the said lands embraced in the Suscol Rancho from the operation of the general pre-emption laws of the United States, and conferred the right of pre-emption to said lands upon
57 the purchasers under Vallejo, claiming title under said rejected grant; and the defendants thereupon entered the said lands so claimed by them, and were about to receive a patent from the United States for the same, including the *locus in quo*, under the provisions of said Act of 1863

The plaintiff, claiming to have acquired a pre-emption right under the general pre-emption laws before the passage of said Act of 1863, thereupon brought this suit, particularly setting forth in his

58 complaint the foregoing and other minor facts, and asked that defendants might be restrained from selling or conveying any portion of said land; that he be adjudged to hold the same in trust for the benefit of plaintiff, and required to convey the same upon payment of the purchase money required by law, and that plaintiff be restored to the possessions, etc.

The contest, therefore, arises under the general pre-emption laws of the United States, under
59 which the plaintiff claims, and the said special Act of March 3d, 1863, giving a special right of pre-emption for a period of twelve months after the return of the surveys to the *bona fide* purchasers from Vallejo, and their assigns to the extent of the land which they have reduced to possession.

Two question arise: Firstly—Does the Act of 1863 attempt to withdraw from the operation of the general pre-emption laws those lands upon
60 which other parties after the rejection of the grant and before the passage of said Act had entered and made pre-emption claims in accordance with the general pre-emption laws of the United States, and confer the pre-emption right to such lands upon the purchasers from Vallejo? And, secondly—If so, has Congress the power to so withdraw such lands and cut of the pre-emption right after its inception, but before perfected by payment, and confer the right upon the purchasers from Vallejo?

These are the two questions presented for our consideration, and relied on by the appellant, and we are of the opinion that both must receive an affirmative answer.

The circumstances under which the Act of Congress in question was passed are perfectly notorious, and constitute a part of the history of the State. Eighteen square leagues of land, known as the Suscol Rancho, were claimed under a Mexican grant to Vallejo. It had been divided up and conveyed and re-conveyed in numerous parcels to large numbers of citizens of California, who had, to a large extent, reduced it to possession, cultivated it, placed upon it extensive and valuable improvements, and made it the permanent homes of themselves and their families, under the idea that they had a good title. Within its limits were the United States Navy Yard at Mare Island, and the depot and extensive works of the Pacific Mail Steamship Company; and two considerable cities had grown up on it, each of which had, successively, been the capital of the State of California—the inhabitants being purchasers and claimants under Vallejo A large portion of the inhabitants of one populous county and of portions of another claimed under and relied on title derived from Vallejo. After said lands had thus been occupied and improved, and large portions of them being conveyed and reconveyed for upwards of fifteen years, and the

64 value been largely enhanced by the labor and money of those who thus claimed in good faith the grant, after having been confirmed by the Board of Land Commissioners and the decree of confirmation affirmed by the District Court of the United States on appeal, was in 1862 rejected by the Supreme Court of the United States, which rejection had the effect, in the sorrowful, but forcible, and unfortunately too true language of Mr. Justice Grier, "to confiscate the property of
65 some thousands of our fellow-citizens who have purchased under this title and made improvements to the value of many millions, on *suspicion first raised here* as to the integrity of a grant universally acknowledged to be genuine in the country where it originated." (*United States* vs. *Vallejo*, 1 Black, 555) The obvious remedy for this wholesale confiscation did not escape the learned Justice named, for in the same opinion he
66 expresses the hope, destined soon after to be realized in the passage of the said Act of 1863, "that Congress will not suffer the very numerous purchasers to forfeit the millions expended on the faith of the treaty obligations." (Ib., 558.)

Soon after the rejection of the grant a multitude of people rushed upon the lands which their neighbors had bought, paid for, improved, occupied and cultivated for many years, and set up claims to one hundred and sixty acres each, under the pre-emption laws of the United States. It

67 was in view of this condition of things, which is notorious in the political, civil and judicial history of the State, that the Act of Congress of March 3, 1863, was passed, and in the light of these surrounding circumstances must it be construed. The Act is entitled "An Act to grant the right of pre-emption to *certain purchasers* on the Suscol Rancho in California." Section 1 provides for extending the lines of the public surveys over the rancho; Section 2. "that after the return of such
68 approved plats to the district office, it may and shall be lawful for individuals, *bona fide* purchasers from said Vallejo, or his assigns, to enter, according to the lines of the public surveys, at one dollar and twenty-five cents per acre, the land so purchased, to the extent to which the same had been reduced to possession at the time of said adjudication of the Supreme Court, joint entries being admissible by coterminous proprietors to such
69 extent as will enable them to adjust their respective boundaries." Section 3 provides for *municipal* claims of the two cities situate on the rancho. Section 4, for presenting the claims to the Register and Receiver within twelve months after the return of the surveys, "accompanied by proof of *bona fide* purchase under Vallejo, of settlement, and the extent to which the tracts claimed had been reduced into possession at the time of said adjudication." Section 5 provides that such claims as shall not be presented within twelve months

70 "shall be barred, and the lands covered thereby with any other tracts within the limits of said Suscol Rancho, the titles to which are not established under this Act, shall be dealt with as other public lands." Then it prohibits the entry of lands reserved for public uses, etc. (12 U. S Statutes at Large. 808)

We shall freely admit that where the language of a private Act is doubtful or ambiguous, or admits of different meanings, that construction
71 will be adopted which is most favorable to the public interests. We do not question the authorities cited on that point. But, in this case, we fail to perceive wherein the meaning of the statute in question, viewed in the light of the condition of things which induced its passage, is doubtful or ambiguous, or how the public interest will be promoted by allowing strangers, under the cloak of a law. the general letter of which, but not the spirit, by accident extends to a case which it would be a
72 libel upon Congress to intimate, or for a moment suppose was ever intended to be embraced in its provisions, to intrude upon lands which others have cultivated and improved for many years, under the belief that they had a good title, protected by the solemn treaty of the Federal Government, and for which they have paid the full value, and enter the same at a very small fraction of the present value given to it by such labor of others, rather than the party who has honestly

labored upon and improved it, and by his labor and money imparted to it by far the greater portion of that present value. Nor do we question the rule adopted in *Chotard* vs. *Pope*, (12 Wheat. 587) and *Lytle* vs. *The State of Arkansas*, (9 How U. S. 333) to the effect that when a party is authorized by an Act of Congress generally to enter "in any Land Office," etc., "a quantity of land not exceeding," etc, he must be limited in his selection to lands subject to location, and cannot take lands already sold, or reserved from sale, or upon which a pre-emption, or some other right, has attached under a law, which is still in force, and which "covers" and protects it The rule is obviously sound. It cannot for a moment be supposed that Congress, by such general Acts, contemplated that the party should be authorized to take land upon which other parties had already entered and taken steps to acquire it, and were diligently pursuing their rights under Acts *still in force* with reference to that land, or that it intended in this general way to repeal such Acts. The two Acts in such cases are not necessarily inconsistent, and can be so construed in the mode adopted by the Court as to stand together; and in such cases it is obviously the duty of the Court so to construe them. But such is not the case with the Act we are now considering. We have already seen the condition of things which demanded the special remedy that was promptly given.

76 A large number of citizens, who had paid those supposed to have the title under the Mexican grant and stipulations of the treaty with Mexico for the lands, who had spent years in improving them, were likely to be turned out by others, who, disregarding their equities, entered upon their cultivated fields, and availed themselves of the labors of such purchasers, under the cover of the general pre-emption laws, which, by their general terms, unfortunately embraced a case, as general
77 laws sometimes necessarily do, never contemplated by Congress, and to the extent of the *bona fide* purchase, at least, never could by any possibility have been contemplated by any wise or just legislative body. The policy of the pre-emption laws was undoubtedly beneficent. They were intended to give those who were pioneers in the unsettled wilds of the public domain the first right to purchase the unoccupied lands which they have had the courage and hardihood to settle, and it
78 will always be our pleasure as well as duty to extend to all such the utmost protection justified by the laws of the land. But this beneficent policy has no element in harmony with the principle that impelled men to rush in upon the improved possessions, and to avail themselves of the labor of their neighbors, under the condition of things connected with the Suscol Rancho. The equities which lay at the foundation of the pre-emption policy were, in this particular instance, not with

those who entered upon the possessions of such of their neighbors as were honest purchasers; but they were all and even equities of a much higher obligation, with the purchasers in good faith, who were not merely pioneers who had crossed the continent in seach of homes, but also parties who had paid for their lands, and long occupied and improved them, under the belief that they had a good title; and Congress hastened to recognize and give effect to those equities by passing the Act in question

The object to be accomplished was to give those parties who had once paid for their lands the first right o purchase from the Government at the usual price the lands which they had before actually purchased and paid for in good faith, to the extent to which they had reduced them to possession before their title had been declared void by the Supreme Court. To this end it was provided that "it may and shall be lawful for individuals, *bona fide* purchasers from Vallejo or his assigns, to enter, according to the lines of the public surveys, at $1.25 per acre, the land so purchased, to the extent to which the same had been reduced to possession at the time of said adjudication," etc.

We cannot presume that Congress was unaware that others had, before the passage of the Act, entered upon the former possessors with a view of acquiring the lands by pre-emption We must

82 presume that that body performed its great public duty and informed itself fully of the true condition of things before taking final action upon a matter of so great public as well as private concern. Is it possible to doubt, in view of the condition of things which called for such legislation, and of the language of the Act passed, so well adapted to the exigencies of the case, that it was intended to give to th · *bona fide* purchasers from Vallejo, and nobody else, the right to enter the
83 lands so purchased to the full extent to which they had reduced them to possession at the time of the adjudication by the Supreme Court, provided they proceeded to perfect their right in the mode and within the time prescribed? Or could Congress, with any show of justice or decency, have done less? Others may doubt, but we cannot. The language is its own interpreter. It could not well be plainer The next section is in strict harmony with this view. It directs the clai . ants under the
81 Act, within a specified time, to present their claims, "accompanied by proof of *bona fide* purchase under Vallejo, of settlement and the *extent to which the tracts claimed had been reduced to possession at the time of the adjudication.*" Why this specific pointing out of the land, and requiring proof as to the extent of the possession, if, when so proved, it was not intended to allow an entry of the land, and of the whole so purchased, settled, and actually possessed? The language is

85 special, and directed to particular individuals and specific lands, and it must be presumed that Congress intended that any prior general laws in conflict with its provisions must yield.

If Congress, instead of describing the land with reference to these defendants, in the language used in the Act, had said it may and shall be lawful for John B. Frisbie to enter, $1.25 per acre, the southwest quarter of section numbered 25 in township numbered 4 north, range numbered 4
86 west, of Mount Diablo meridian and base, in the county of Napa and State of California, we apprehend it would not have been contended that Congress did not intend to allow Frisbie to enter that particular piece of land even if somebody else had, before the passage of the Act, gone upon it with a view of acquiring a pre-emption right. There would have been no possibl · room for doubt, because the equities in his favor entitled him to the consideration of Congress, and he was authorized,
87 in accordance with such equities, to enter that specific piece of land There would be no chance for selection. He must enter that and nothing else, and it would only be necessary to apply the description to the land to ascertain what specific tract of land was intended. But the description in the Act is just as specific as it is The party who is entitled to enter the land must be a "*bona fide* purchaser from Vallejo or his assigns," and the land which he is authorized to enter is "the

land so purchased to the extent to which the same had been reduced to possession at the time of said adjudication of said Supreme Court" We have only to apply these descriptions by ascertaining who is a *bona fide* purchaser from Vallejo, what land he purchased, and to what extent he had reduced it to possession at the time specified, and we have the party who is entitled to purchase and the specific piece of land which he is entitled to enter, and he is entitled to enter no other under the Act There is no opportunity for selection. The statute has made the selection for him. The description is just as specific as the one indicating the land at a certain quarter section, describing by number, township and range. The language of the Act is not open to construction as to what land may be entered, and the difference between this case and those of *Chotard* vs. *Pope*, and *Lytle* vs. *State of Arkansas*, (supra) where the parties were entitled to select lands from a much larger portion of the public domain, is so obvious that argument can scarcely make it more plain. Where an Act authorizes a party to enter any thousand acres of land, he may select within specified exterior boundaries containing one hundred thousand acres, or in a whole state, and it happens that the Government has already sold a given tract within said boundaries, or a pre-emption right in favor of another party has already attached to said particular tract under some prior law, it is

91 not for a moment to be supposed that it was intended to permit an entry of the tract of land so sold, or upon which such prior right had already attached. But if he is authorized in express terms to enter the specific tract, and no other, before sold or upon which the pre-emption right had attached, there can be no doubt as to the intent to allow the entry of that specific tract, whether it was in the power of Congress to give effect to that intent or not. And that is just the difference between
92 the cases cited and the one now under consideration.

Of course if Congress intended to give to the *bona fide* purchasers under Vallejo the first right to purchase, it did not intend that strangers to that title should, also, have the first right to purchase the same land under the general pre-emption laws, for the two ideas are repugnant, and the last specific expression of the legislative will, if within the power of Congress so to enact, must prevail
93 over the former general and inconsistent provisions of the statutes.

We are of the opinion, therefore, that the Act in question withdraws the lands which were purchased *bona fide* from Vallejo and reduced to possession prior to the rejection of the Mexican grant from the operation of the general pre-emption laws, and confined the right to purchase within the restrictions prescribed in the Act upon such purchasers from Vallejo or his assigns. We have

94 expressed this view several times before, and should now have been content to refer to the cases of *Hastings* vs. *McGoogin* (27 Cal. 85); *Page* vs. *Hobbs* (Id. 487); *Page* vs. *Fowler*, (28 Id. 609) and *People* vs. *Shearer* (30 Id. 650) had not eminent counsel elaborately argued the question with great earnestness and apparent confidence, and fortified their position by a more recent decision, which seems to support their view of a highly respectable Federal tribunal—the Supreme Court
95 of the District of Columbia—in the case of *Whitney* vs. *Frisbie*, arising under the same Act, involving the same questions, and decided since the publication of our own decisions in the cases cited. But, after a careful review of the question, we are satisfied with our conclusions before attained.

The only other question made by counsel is, did Congress have the power to withdraw these
96 lands from the operation of the general pre-emption laws after a competent party had entered with an intent to claim a pre-emption right, and before the right could be perfected by payment or entry, but while the party was not in default? This presents the naked question of *power*, *not* of the *propriety of its exercise*, conceding the existence of the power, nor *of mere good faith*. It is nothing less than a question of *power*. Congress having determined the question of policy we have nothing to do with that question and there is no

97 occasion to discuss it. The naked question is, did Congress have the power to withdraw these lands under the circumstances from the operation of the general pre-emption laws? If so, it is our duty to give effect to the statute in question.

On this point, after stating the withdrawal of the lands of the Suscol Rancho from the operation of the general pre-emption laws, we said in *Page* vs. *Fowler*, (28 Cal. 609) "and there can be no doubt that Congress had the power to thus withdraw the
98 lands from pre-emption and sale, under the general laws at any time prior to the acquisition by the settler of a right to the lands *that he could maintain against the United States, so as to secure ultimately the legal title*." And in *People* vs. *Shearer*, (30 Cal. 650) in ascertaining the character of the interest which a pre-emption claimant has in the land, we expressed the opinion that the land in occupancy of a pre-em tion claimant, and to which
99 a pre-emption right has attached may be withdrawn from the operation of the pre-emption laws of Congress at any time before payment has been made for the same to the United States, and referred to *Hastings* vs. *McGoogin*, and *Page* vs. *Hobbs*, (supra) in which the question was directly made and, by implication at least, determined. We also there expressed our approval of the opinion of Mr. Attorney General Speed on this point, given to the Secretary of the Interior for his guidance in disposing of the conflicting claims

100 under the same Acts of Congress now under consideration, and in pursuance of which the Secretary of the Interior acted in making the decision which has given rise to this suit. (11 Ops. Atty. Genl. 491.) Upon further consideration we find no reason to modify our views upon the question, but, on the contrary, we are fully satisfied of their entire soundness. No *proprietary* interest in the land, *as against the United States*, is acquired till payment. The parties embraced within the purview
101 of the general pre-emption laws are simply authorized to enter the lands in preference to others, when the proper time comes, and the lands are thrown open for sale, on paying the purchase money in the mode prescribed. It is a general law designating the order of preference to be given to parties desiring to purchase, and a rule for the guidance of the officers of the Land Department in the disposition of the public lands which they
102 are not authorized to disregard without the authority of Congress. It is a mere privilege conferred, so far as the rights of the pre-emptioners are concerned, in case the lands should ever be offered for sale. But they may never be thrown upon the market. There is no right whatever given to have the lands ever open for sale. There is no contract between the pre-emptioner and the Government. There is no obligation on the part of the pre-emptioner to take the property, or of the Government to sell. The claimant may, at

the last moment, abandon his pre-emption and locate another, or may decline to take any, and the Government cannot complain. There is no mutual obligation—none on either side. The Government is not bound to sell at all until, in its discretion, it elects to do so. The statute simply designates the person who shall have the first privilege to enter while the statute remains in force, and when the land is thrown open to entry in the ordinary course of the sales of the public lands. The Government cannot be compelled to throw open the land for entry, or to permit an entry to be made, till in its own good time it sees fit to do so The pre-emptioner has no contract obligation which he can in any way enforce. If all pre-emption laws should be repealed and never re-enacted, a party who has merely entered as a pre-emptioner, without payment, would have no right which he could enforce against the Government. He would have no action for damages, and could not compel the issuing of a patent by mandamus. If a party goes upon the public land with a view to pre-emption. he does so knowing that it may never be sold. The Acts of Congress do not present the Government in the character of a party making executory contracts, but in the character of a Government which will, when it determines to sell its public lands, generally dispose of them in accordance with certain rules established by itself. We have no doubt that it is

competent for Congress at any time before the payment of the purchase money, to withdraw the land from sale, reserve it for its own use, or repeal all pre-emption laws, and take away any right of entry thereunder. The *power* exists. It is only a question of good faith and expediency. The right of pre-emption is a mere privilege, given for the time being, and, whatever the case may be with reference to other claimants, while the law is in force, not a right of property *as against the Government*, and it can be withdrawn at any time before it has been perfected into an obligation which can be enforced against the Government itself, and that is before a sale and payment. Such is the view taken by several Attorneys General of the United States. (See opinions of Mr. Attorney General Cushing on pre-emption claims, 8 Op. Att'ys Genl. 71; opinion of Attorney General Bates, 10 Op. Att'ys General 57; opinion of Attorney General Speed, 11 Op Att'y Genl. 491.) And such, we are satisfied, is the correct view. A similar view was taken in *Bower* vs. *Higbee*, (9 Mo. 261) and in *O'Hanlan* vs. *Perry* (9 Mo. 808). So the United States Supreme Court very pointedly intimate a similar view in *Hale* vs. *Gaines*, (22 How. 161) where, in speaking of the character of a pre-emption claim, it is said: "Percival *had no vested interest in the land that a Court of Justice could recognize.* Then, the United States Government was the legal owner *and had the power*

to reserve from sale." And we know of nothing to the contrary in judicial decisions anywhere, other than the late case of *Whitney* vs. *Frisbie*, referred to in this opinion. The language of the Act recognizing pre-emption rights is clearly not the language of grant, perfect or inchoate, nor of contract, nor obligation. It is simply permissive and directory. If the pre-emptioner acquires any right, *as against the Government*, before the payment, it attaches from the very moment of entry upon the land with intent to claim a pre-emption right, and thereafter it would be incompetent for Congress or the Government of the United States, in any mode to increase the price or change any condition of purchase, reserve the land for public use, take timber, minerals, stone, earth, or other thing from it, or do anything affecting the land, without the consent of the party who has thus entered, and who, unless an implied license can be inferred from the legislation on the subject, is himself a trespasser — while the settler could enter upon the land, and after stripping it of timber or other valuable thing abandon it at pleasure, and repeat the process *ad libitum*, and the Government could claim nothing under the pretended contract, which is binding only on one side. The whole public domain, by the conferring of this simple privilege of pre-emption, might thus be withdrawn from the power and control of Congress, under whose authority it is placed by the

112 Federal Constitution. We do not think it was ever contemplated by Congress, in passing the pre-emption laws, that an entry upon the public lands, with a view of acquiring a pre-emption right, would give to the party entering a right, without any corresponding obligation to purchase, which could not afterwards be withdrawn, or in any degree varied, without the consent of such party, or that such is the effect of the pre-emption laws upon any reasonable interpretation. Such is
113 not the express provision of those Acts, and if the construction is open to doubt, or in any degree ambiguous, we have already seen – and so appellants claim the rule to be with respect to other points – that that construction must be adopted *which is most favorable to the public interests*, and we apprehend it will not be maintained that the public interest will best be promoted by subjecting the entire public domain to be withdrawn
114 from the control of Congress upon such considerations. A pre-emption right is not an inchoate grant, nor in any just sense an inchoate title, *as against the Government*, whatever the rights of pre-emptioners may be as between individual claimants, while the pre-emption laws are unrepealed and still in force to "cover" the claim.

Several cases are cited from the Supreme Court of the United States, by the learned Chief Justice of the Supreme Court of the District of Columbia, in the case before referred to, to sustain a different

115 view, but with the greatest respect for the opinion of that tribunal, and of such of our associates as adopt a similar view, as we conceive, they do not touch the question. Thus, in *United States* vs. *Fitzgerald*, (15 Pet. 407) the Court say: "It cannot be pretended that the land in controversy was reserved from sale by any Act of Congress, or by order of the President, unless the direction of the Secretary of the Treasury to reserve it from sale *several months after it had been actually sold and*
116 *paid for* could amount to such an order." (Id. 420.) Of course there could be no reservation "several months after it" [the land] had been *regularly actually sold and paid for*. This is something more than a pre-emption right. The party had availed himself of the privilege conferred, and the contract of sale had been actually entered into and the money paid. The contract was executed on one side, at least. Thenceforth
117 the purchaser was, in *equity*, the actual owner of the land, and the United States merely held the *naked legal title*, without any beneficial interest, *in trust*, for the benefit of the purchaser. The land was no longer a part of the public domain. (*Carroll* vs. *Spafford*, 3 How. U. S. 460; *Astrom* vs. *Hammond*, 3 McLean 108; *Carroll* vs. *Perry*, 4 McLean 26; *Gwynn* vs. *Niswanger*, 15 O. 368; *Ross* vs. *Supervisors Ontagamie County*, 12 Wis. 38; *Goodlet* vs *Smithson*, 5 Port. 246; *People* vs. *Shearer*, 30 Cal. 648.) That case certainly con-

118 tained nothing inconsistent with any view maintained in this opinion. The case of *Lytle* vs. *State of Arkansas*, (9 How. 333) we have before cited, and it is wholly different from the present case We commented upon the case in *People* vs. *Shearer*, (30 Cal. 658) and endeavored to show that it contained nothing to support the position maintained by appellants, and it is unnecessary here to repeat what we there said. We will remark in addition, however, upon the passage
119 deem d so conclusive, quoted from the opinion of Mr. Justice McLean by Chief Justice Carter in *Whitney* vs *Frisbie:* "Until sanctioned by law, it [the pre-emption right] has no existence as a substantive right; but *when covered by the law* it becomes a legal right, subject to be defeated only by a fai ure to perform the conditions annexed to it" Undoubtedly so. We fully subscribe to this view in the sense and connection in which it was
120 stated by the learned Justice. He was speaking of a right as between adverse claimants, under two different statutes, *both in force at the same time.* Cloyes claimed a pre-emption right, which had vested under the pre-emption laws *then in force.* The State of Arkansas under authority of another statute, general in its terms, to select and enter a certain amount of land—not to enter a *specific tract*—for public purposes, by its Governor *selected* the tract of land upon which Cloyes' pre-emption right had attached. The Court very

121 properly held, and as any other Court doubtless would have held, that the State of Arkansas was not authorized to select *that* land, because a pre-emption right had already attached under a law *which was still in force*, and not repealed; that the two Acts were not inconsistent, and could stand together; that it was not intended to permit the selection of such lands as were then encumbered with other rights, and that the law under which Cloyes claimed was still in force. His
122 claim was, therefore, at that time, "*covered* by the law," and protected by it. The right was given by a law then in force, and was, therefore, as between him and the other claimant, a legal right, and being thus "covered by the law," it could only be defeated by failure to perform the conditions. This was all that was said or intended to be said. But suppose the statute under which Cloyes claimed had been repealed before the right had
123 been perfected by payment, and before the passage of the other Act authorizing the State of Arkansas to enter the lands, then the pre-emption right of Cloyes would have been no longer "covered by the law," and the conditions under which the learned Justice said it could not be defeated, except by failure to perform, would have ceased to exist. Or, suppose Congress to have authorized the State of Arkansas to enter that specific tract of land, describing it by lines of the public surveys, or in such other manner that it could be

124 easily identified, which would necessarily have been inconsistent with Cloyes' pre-emption right, and therefore have repealed it, and thus taken away the cover of the law, different questions would then have been presented, and one analogous to that now in hand. But the case is only authority for a pre-emption right "*when covered by the law*," which is not this case; and since the learned Justice was so careful to limit his language to the case before him, which *was so covered*, we
125 must infer that he was of opinion that a different rule would prevail when a right ceased to be "covered by the law."

The case of *Delassers* vs. *United States*, (9 Pet. 133) is the case of a Spanish grant protected by the treaty of purchase of Louisiana. It was the case of an inchoate title in the grantee himself, as against the Government, which had already made an incipient grant—a very different thing from a pre-emption right under the pre-emption
126 laws of the United States, in which case the Government has not taken the first step toward making a grant. It has only prescribed a general rule for the government of all persons and all its affairs in the disposition of the public domain. *Smith* vs. *The United States*, (10 Pet. 330) was a similar case, and *Rice* vs *Railroad Company*, (1 Black, 360) was, also, a case of grant for railroad purposes. Neither of these cases therefore affords any aid in the solution of the question now under

consideration. If these cases were supposed to lend any support to the conclusions attained by the Supreme Court of the District of Columbia, with due deference, we are compelled to think their scope and bearing entirely misapprehended.

So the case of *McAfee & Hein* vs. *Keirn*, (7 S. and M. 780) is a case where the pre-emption right, like that in *Lytle* vs *State of Arkansas*, was covered by a law then in force, and the patent to the other party was, therefore, issued by the officers of the Government without the authority of any law whatever. So the case of *Isaacs* vs. *Steel*, (3 Scam. 99) and *Bruner et al.* vs. *Manlove*, (Id. 341) and all others cited to sustain the same view, are cases of the same sort, and are in no respect inconsistent with anything contained in this opinion.

We are at a loss to understand, also, how that learned tribunal could come to the conclusion that the Act of 1863 limited the *bona fide* purchasers from Vallejo to an entry of one quarter section in one tract in case of an interference with the claim of some pre-emptioner under the general pre-emption laws, in the face of the express provisions that they might "enter according to the lines of the public surveys * * * *to the extent to which* the same had been *reduced to possession* at the time of the adjudication of said Supreme Court," and that they were to make proof of the "extent to which the tracts claimed had been reduced to possession at the time," etc. To our minds it seems clear

130 enough that the *bona fide* purchasers under Vallejo and their assigns, were authorized to enter all the lands purchased, to the full extent to which the same had been reduced to possession at the time of the rejection of the grant, be it more or less, and without regard to intruders on such possessions. Where a man had in good faith purchased and paid for a thousand acres, reduced it to possession, cultivated and improved it, till he had by his labor, money and inhabitancy increased its
131 value two, three, four, or tenfold, as the case might be, the equities were just as strong in his favor as to the whole as though he had only purchased, improved, and thereby enhan ed the value of one hundred and sixty acres; and there would be just as little equity in allowing him to be deprived by a stranger of the fruits of his labor and expenditures, under the cloak of the general pre-emption laws, which could never have been intended to embrace such a case, of the excess over one
132 quarter section; and the language of the statute, it seems to us, authorizes an entry of all which had been reduced to possession. The object was to relieve what Mr. Justice Grier so feelingly calls a confiscation, and this object could only be accomplished by allowing the purchaser to enter all, at least, that had been reduced to possession and materially enhanced in value by their labor. The land must, of course, be entered according to the lines of the public surveys, because all lands are

133 so entered. The very object of the public surveys is to have a convenient, systematic. uniform and certain mode. The reason for allowing joint entries by coterminous proprietors is obvious enough. The object is, in fact, expressed, "to enable them to adjust their respective boundaries," not to limit the amount which any one purchaser from Vallejo shall be permitted to enter. The smallest subdivision which can be entered under the system of surveys adopted by Congress is the sixteenth of a
134 section, or forty acres. The purchases from Vallejo were made long before the Government surveys were made, and without reference to such surveys. It might often happen, therefore, that a forty or eighty acre tract would so fall as to embrace portions of land held and possessed by two or more purcha ers from Vallejo. As neither would be entitled to enter the whole, and as they must enter according to the lines of the survey,
135 or not at all, neither could enter his own share alone; hence, in such cases, to enable the parties to enter all they had respectively purchased and reduced to possession, and to afterward adjust their boundaries between themselves, they were authorized to enter such tracts jointly.

We are unable to derive from these provisions any support to the idea that each purchaser from Vallejo must be limited to a quarter section in case of any interference with an intruder upon his possession claiming a pre-emption right under the

136 general laws. On the contrary, they seem to us to support the opposite view, so far as any argument bearing on the point can be derived from them. It shows that nothing purchased and possessed in good faith was intended to be lost to them.

These are the great questions in the case upon which the right of the parties to this action must turn, and the only points presented by appellant's counsel for our consideration, and on these points
137 we should have entertained little doubt had not the learned Justices of the Supreme Court of the District of Columbia, and two of our associates, as to one point, entertained a different opinion. Our respect for that tribunal, and for the opinions of our brethren, has led us to reconsider the questions with care; but with deference to the views of those who have reached a different result, upon further consideration aided by the somewhat elaborate opposing opinions, and the very elaborate
138 arguments of the eminent counsel engaged on the part of appellant, our former views are fully confirmed.

It is understood that the case of *Whitney* vs. *Frisbie* has been taken to the Supreme Court of the United States for review, on a writ of error. As the decision of that tribunal upon the questions involved would be authoritative and binding upon us, we were in hopes that there would have been an early decision, and we have delayed the

decision in this case on that account. But we have satisfied ourselves that a decision in that case cannot be expected for a long time to come, and we do not feel justified in any longer delay. As both parties claim a right under a statute of the United States, the decision in any event, must be against a right claimed under a law of Congress, and our decision can doubtless be reviewed by the Supreme Court of the United States. Since we entertain a different view from that taken by the Supreme Court of the District of Columbia and two of our associates, it is gratifying to know that there is an arbiter between us in the Supreme Court of the United States, and that, if we are in the wrong, our error can be corrected and justice be awarded by that august tribunal.

Judgment affirmed. SAWYER, C. J.

We concur: RHODES, J.

SANDERSON, J.

112

CLERK'S CERTIFICATE.

STATE OF CALIFORNIA, *ss.*

Office of the Clerk of the Supreme Court of the State of California, September 11, A. D. 1869.

I, the undersigned, Clerk of said Court, hereby certify that the annexed and preceding 19 (numbered 1 to 19 inclusive) pages of printed matter, constitute a full, true and correct copy of a Tran-
113 script on appeal on file in said Court in case No. 1636, entitled, *Robert T. Hutton*, appellant, vs. *John B. Frisbie et als.*, respondents, and the next succeeding 30 pages, numbered 20 to 49, inclusive, constitute a full, true and correct copy of the opinion of the majority of the Judges and decision of said Supreme Court delivered and filed and remaining on file in my office, at the July Term, A. D. 1869, and that the judgment of the Court below was thereby affirmed.

144 In witness whereof, I have hereto set my hand and official seal, at my office, Sept. 11. 1869

Geo. Seckel

Clerk Supreme Court of California

Pueblo
6 Cases 157 - 40 20
Introduction, Gaines 2
9 Now - Nichols
354
9 Cases
164
7 When
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14 Sent -
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37TH CONGRESS, 3D SESSION. } SENATE. { REP. COM. No. 95.

IN THE SENATE OF THE UNITED STATES.

FEBRUARY 17, 1863.

Mr. HARDING, from the Committee on Public Lands, submitted a Report, (No. 95,) accompanied by the following Bill, which was read and passed to a second reading. Passed, finally, March 2d, 1863; approved March 3d, 1863.

REPORT.

[To accompany Bill S. No. 537.]

The facts upon which the Committee on Public Lands base a favorable Report upon the above-named Bill are as follows:

The Soscol Rancho is settled upon and occupied by an enterprising body of agriculturists—men who have spent their means liberally in making improvements—claiming their lands under the Soscol grant of M. G. Vallejo. In 1847 the town of Benicia was laid out, its projectors and settlers relying on the Vallejo title. It has grown to be a town of several thousand inhabitants, and is among the more important of the interior villages of California. The town of Vallejo is upon the same rancho, was laid out in 1850, and is also of considerable importance, the lands therein being held under the same title. The entire rancho has passed out of the hands of the original grantee into the possession of a multitude of small holders, and is covered by numerous small farms and orchards, each enclosed by substantial fences, highly cultivated, and dotted all over with comfortable farm-houses and other buildings. All these settlers upon the rancho hold by a purchase of M. G. Vallejo, having paid for their lands in good faith and in the firm belief, supported by the best legal advice attainable, that the title of Vallejo was valid. Several millions of dollars have been expended in improvements upon the rancho, and hundreds of thousands of dollars are secured by mortgage upon the farms into which the rancho has been divided. It is obvious that great confusion and distress must arise in a community of this character, with property interests so extensive, when it is discovered that their title is invalid, and the wealth they had supposed their own is suddenly taken away, and all the accumulations of years swept from them.

There are many circumstances which tended to give to the settlers upon the Soscol Rancho confidence in the title which they purchased. M. G. Vallejo, the grantee from the Mexican government, belonged to one of the most influential families of California. In 1827 he was a membes of the departmental legislature. He afterwards held a high official position under Governor Figueroa, and still later, in 1839, was commissioned as military commandant of Alta California. At various times during the troubles in Mexico, and its consequent pecuniary straits, he furnished the government large sums of money and other supplies, and in consideration of these favors to the government, Micheltorena, then governor of California, and invested with extraordinary powers by the home government, granted to Vallejo the Soscol Rancho in 1843, several years before the conquest of the state by the

United States. From that time Vallejo had the exclusive and undisputed use and possession of the rancho, having upon it his residence, several thousand head of horses and cattle, numerous dependents and retainers, and exercised over it all acts of ownership. Thus matters stood when California became a part of the Union by a treaty guaranteeing, on the part of the American government, protection to the property of Mexican citizens. Complying with the law of Congress requiring Mexican citizens to prove their ownership of grants, Vallejo presented to the board of land commissioners his claim to the land he had held and owned for years before. That board was satisfied as to the meritorious character of this grant, for after a thorough investigation of the documentary evidence in the case, and an elaborate examination of witnesses, the case was confirmed by said board on the 22d May, 1858. This decision of the board of land commissioners was subsequently confirmed by the higher tribunal of the United States District Court for the northern district of California.

After this grant had passed the ordeal of two courts of the United States, and had been endorsed by them as genuine, the owner would naturally feel warranted in selling portions of the same to third parties, and those desiring to purchase would not be apt to doubt the validity of the title against the decision of two courts of the United States. In addition to this, it should be stated that the government, desiring a location for a military establishment near Benicia, caused an investigation to be made into the *bona fides* of this title, under the supervision of the Attorney General, and that officer reporting that the title was valid, the government purchased a portion of the land and now holds it under the Vallejo title.

After these various decisions the validity of the title was taken for granted until the decision of the United States Supreme Court. That decision was not made upon any alleged fraud, but upon a technical question as to the powers and duties of Micheltorena in making the grant, and this question was raised for the first time in that court.

Justice Grier, who, with Justice Wayne, dissented from the majority of the Supreme Court in rejecting the grant on technical grounds, said:

"If this treaty is to be executed in good faith by this government, why should we forfeit property, for which a large price has been paid to the Mexican government, on the assumption that the Mexican government would not have confirmed it, but would have repudiated it for want of formal authority? Vallejo was an officer in the army, high in the confidence of the government. His salary as an officer had been in arrear. In a time of difficulty he furnishes provisions and money to the government of the territory. How do we know that Mexico would have repudiated the sale of 80,000 acres as a robbery of its territory, when any two decent colonists, having a few horses and cows, could have 100,000 for nothing?

"I believe the Mexican government would have acted honestly and honorably with their valued servant, and that the same obligation rests on us by force of the treaty.

"Now, that the land under our government has become of value, these grants may appear enormous; but the court has a duty to perform under the treaty, which gives us no authority to forfeit a *bona fide* grant because it may not suit our notions of propriety.

"We are not, for that reason, to be astute in searching for reasons to confiscate a man's property because he has too much. Believing, therefore, that in the case before us the claimant has presented a genuine grant for a consid-

eration paid, which the Mexican government would never have disturbed for any of the reasons now offered for confiscating it, I must express, most respectfully, my dissent from the opinion of the majority of the court, *with the hope that Congress will not suffer the very numerous purchasers to forfeit the millions expended on the faith of treaty obligations.*

The bill reported by this committee respects the occupancy of the numerous holders under this title, recognizing it as a pre-emption, and authorizing a sale to them for the minimum price of public lands, they paying the cost of surveys and all other expenses.

It has been the uniform practice of Congress to respect and protect the *improvements* of settlers. By the decision we have referred to, a considerable quantity of land, covered with settlers' improvements, has suddenly become the property of the United States. To send out a commission to California to appraise these improvements would absorb all the government could realize from the sale of the lands. Yet, to treat the settlers as intruders upon the public domain, and deprive them of the fruits of their labor and investments, would be a gross departure from the practice of the government and a great injustice to the settlers. As the bill proposes to sell them their lands at the government price, they to be at all the expense necessary for surveys, litigating conflicting interests, &c., the government will probably realize more from the lands than it can from any other mode of treatment, while it will do justice to its citizens whose interests are so deeply involved in the premises.

The legislation proposed in the bill is consistent with the precedents of congressional legislation in land cases. By act of Congress, approved June 27th, 1851, the right of pre-emption was granted to certain settlers on the Maison Rouge grant in Louisiana. The Congress passed the act to take effect "in the event of the final adjudication of the title in favor of the United States."—(9 Stat. at Large, p. 565.) The final decision is reported in 11 Howard, 663, and the act was passed while the case was pending.

Another act, entitled "An act for the settlement of certain classes of private land claims within the limits of the Baron de Bastrop grant, and for allowing pre-emption to certain actual settlers in the event of the final adjudication of the title of said de Bastrop in favor of the United States," was approved March 3, 1851.—(9 Stat. at Large, p. 597.) The case is found in 11 Howard, p. 609.

The settlers on the above-named grant were comparatively few in number, and the grants eleven times as large as the Soscol grant, while on the latter some three thousand families are settled, and several thousand others, all holding under the Soscol title.

Up to the time of the rejection of the Soscol grant during the present Congress, the settlers were undisturbed by any outside parties; but difficulties have since arisen from the entrance of parties upon the grant on the claim that it is public land, leading to collisions, which must increase if Congress does not intervene. The parties so claiming have entered within the enclosures of settlers, and scenes of violence have hence resulted.

In view of all the facts in the case—the fact that so large a population of industrious agriculturists have settled upon and improved the grant; that they have bought their lands in good faith—the precedents cited, and the consistent policy of the government toward settlers, with the *bona fides* of the grant itself, the committee report back the bill, and recommend its passage.

BILL S. No. 537.

To grant the right of pre-emption to certain purchasers on the "Soscol Ranch" in the State of California.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it may be and shall be lawful for the Commissioner of the General Land Office to cause the lines of the public surveys to be extended over the tract of country known as the "Soscol Ranch," in California, the claim to which by Don Mariana Guadalupe Vallejo has been adjudged invalid by the Supreme Court of the United States, and to have approved plats thereof duly returned to the proper district land office: *Provided,* That the actual cost of such survey and platting shall first be paid into the surveying fund by settlers, according to the requirements of the tenth section of the act of Congress, approved thirtieth of May, eighteen hundred and sixty-two, "to reduce the expenses of the survey and sale of the public lands in the United States."

SEC. 2. *And be it further enacted,* That after the return of such approved plats to the district office, it may and shall be lawful for individuals, bona fide purchasers from said Vallejo, or his assigns, to enter, according to the lines of public surveys, at one dollar and twenty-five cents per acre, the land so purchased, to the extent to which the same had been reduced to possession at the time of said adjudication of said Supreme Court, joint entries being admissible by coterminous proprietors to such an extent as will enable them to adjust their respective boundaries.

SEC. 3. *And be it further enacted,* That municipal claims within the limits of the said "Soscol Ranch," may be entered under the terms, limitations, and conditions of the town-site act of twenty-third of May, eighteen hundred and forty-four.

SEC. 4. *And be it further enacted,* That all claims within the purview of this act shall be presented to the register and receiver within twelve months after the return of such surveys to the district land office, accompanied by proof of bona fide purchase under Vallejo, of settlement, and the extent to which the tracts claimed had been reduced into possession at the time of said adjudication; and thereupon each case shall be adjudged by the register and receiver under such instructions as shall be given by the Commissioner of the General Land Office, to whom the proof and adjudication shall be returned by the local land office, and no adjudication shall be final until confirmed by the said commissioner.

SEC. 5. *And be it further enacted,* That any claim not brought before the register and receiver within twelve months, as aforesaid, shall be barred, and the lands covered thereby, with any other tract within the limits of said "Soscol Ranch," the titles to which are not established under this act, shall be dealt with as other public lands: *Provided,* That no entry shall be made of lands reserved and occupied for military, naval, or other public uses, or which may be designated for such purposes by the President, nor shall any claim under this act extend to mineral lands.